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LAW ON FREE ACCESS
TO INFORMATION
OF PUBLIC IMPORTANCE
OF THE REPUBLIC OF SERBIA

– Analysis of the Law and its Implementation in Practice –

Belgrade, 2007

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INTRODUCTION

In October 2006, we were asked by the American Bar Association, Central Europe and Eurasian Law Initiative (ABA/CEELI), a non-governmental organization, to conduct an analysis of the Law on Free Access to Information of Public Importance of the Republic of Serbia, adopted in November 2004. We spent five days in Belgrade and all of the public officials we interviewed provided a very warm welcome as they endeavored to provide the answers needed for our research.

The sample includes 26 institutions in four cities (Belgrade, Novi Sad, Kragujevac and Niš). The analysis of the surveys, which showed a solid understanding of the right of access to public information, represents just a portion of the research. The majority of our effort was concentrated on the law itself. We performed a legal analysis of the compatibility of the law with international standards and pointed out the main short-comings and practical weaknesses, both according to those standards and from the aspect of theoretical harmonization.

We hope this assessment will be useful to all those who are involved in the application of the right of access to information of public importance.

Today, there can be no modern democracy without transparency. The right to access public information introduces the idea of participative democracy in modern state governance. Every modern state must be based upon the principles of openness and transparency. In this regard, two functions of the right to information are most important – the democratic function and the monitoring function.

The democratic function contributes to a broader participation of citizens in politics and is consistent with participative and deliberative democracies, which emphasize that openness of the performance of public authorities cannot be limited to parliamentary decision-making, but must also include different forms of direct cooperation of citizens in drafting regulations and political decision-making.

The monitoring function enables citizens to oversee parts of public administration, to monitor the work of public authorities, and to supervise expenditures from the budget, which in turn prevents poor governance, abuse of power and corruption. Only through oversight of the right of access to public information can the public examine decisions made by state institutions and their respect of legal and other norms. The sum of this will make the work of state institutions more efficient and

improve respect for the administration due to a closer relationship between the public sector and individuals.

Serbia definitely deserves a better law. The existing law is not without merit, but there are still some weaknesses that should be addressed. The shortcomings could be addressed with the assistance of interested non-governmental organizations, which are very active in Serbia, and with awareness on the part of the Legislature that in the absence of good legislation (and above all, its strict implementation), there can be no increase in overall responsibility of state officials.

It cannot, however, be expected that one institution (the Commissioner) and several dozen non-governmental organizations could take on such an endeavor. Only a change in the mentality of all officials who act on behalf of the people and for the people can have such a dramatic effect. For that to happen, it is necessary to have an understanding of the essence of the right to public information. As with all legal fields, it is the sum of rules and standards. Without such basic knowledge, deciding about this right (and, ultimately, requesting the information) would be difficult.

Each of the five authors of this assessment covered a specific topic from a different perspective. While some aspects of the topics are repeated in certain chapters, the reader can choose to read one relevant chapter, exclusive of other chapters. At the same time, those who read the whole text will have the opportunity to consider certain issues several times from different points of view.

When you finish reading this analysis, it is our hope that, although you might not agree with us, you will have been provided with a different perspective from those who regularly follow the application of the law in this field.

Respectfully,
Nataša Pirc – Musar
Head of the Research Team

Comparison of the FOIA Law to International and Council of Europe Standards

This section begins by tracing the origin of the right of access to information as it arose under international law; looks briefly at the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights; then gives a detailed comparison of FOIA to Recommendation 2002(2) of the Council of Europe. The author compares specific provisions of the FOIA Law to the International Covenant on Civil and Political Rights, and makes conclusions and recommendations. Comments by the Commissioner for Information of Public Importance and by Nemanja Nenadic, Transparency Serbia, are included.

1. Organization of United Nations

The Universal Declaration on Human Rights (hereinafter: the Declaration), adopted in 1948 by the United Nations General Assembly in Paris, establishes certain basic human rights and general principles dealing with human rights. Since its adoption, a number of international, regional and national human rights treaties implemented the principles set forth in this Declaration. Two such documents, the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights adopted in 1966, together with the Declaration, constitute the international charter of rights.¹

From the perspective of free access to information of public importance, it is important to highlight Article 19, Section 2 of the International Covenant on Civil and Political Rights (hereinafter: the ICCPR), which, tracking the language of Article 19 of the Declaration, guarantees that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The aforementioned fully allows citizens to exercise their right to participate in the conduct of public affairs, which is guaranteed by Article 25 of the ICCPR.² This freedom is one of the most significant aspects of participatory democracy implemented in modern states and of the interconnected principle of transparency in the functioning of the state.

1 International Bill of Rights.

2 Article 25: Every citizen shall have the right and the opportunity without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through chosen representatives.

State signatories to the ICCPR, including Serbia, are obliged to recognize the right of everyone to seek information without discrimination. According to Article 2, Paragraph 1 of the ICCPR, this means that the right to seek information is ensured for all individuals within the state territory and subject to its jurisdiction, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³

The exercise of the stated freedom(s) also includes special duties and responsibilities. According to Article 19, Paragraph 3 of the ICCPR, the freedom may be subject to certain restrictions which must be expressly provided by law and necessary for the respect of the rights and the reputation of others, or for protection of national security or public order, public health or morals.⁴ Hence, such restrictions must be justified and necessary to protect one of the listed items, as stated in the General Comment to Article 19 by the Human Rights Committee⁵ which monitors the implementation of human rights guarantees contained in the ICCPR. In accordance with the First Optional Protocol to the ICCPR, adopted in 1966, state signatories, Serbia included, recognize the competence of the Committee to receive and consider communications made by individuals subject to the jurisdiction of the states' parties to the ICCPR and Protocol.

In accordance with Article 1, Paragraph 1 of the Law on Access to Information of Public Importance of the Republic of Serbia⁶ (hereinafter: Serbian FOIA, FOIA), FOIA regulates the right to access information of public importance held by public authority bodies with the purpose of fulfilling and protecting the public interest to know and attain a free, democratic order and an open society.

Since Article 3 of the Serbian FOIA defines public authority bodies as state bodies, territorial autonomy bodies, local self-governance bodies, organizations vested with public authority or legal entities founded or funded wholly or predominantly by a state body, this determination of the Law is in accordance with the legal opinion

3 Article 2, Para. 1: Every State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the language of the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

4 Article 19, Para. 3: The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

5 Report of the Human Rights Committee to the 38th Session of the General Assembly, Supp. No. 40, 1983 (A/38/40), Annexe VI, CCPR General Comment 10.

6 Official Gazette of RS, No. 120/2004.

generally accepted in the world – that states are obliged only to provide information that is within their possession, foremost within the possession of the public administration.

In this regard, the Serbian FOIA is a progressive law, because it extends the obligations contained therein also to courts, as state bodies of the judicial branch. It follows the stated UN standards in that it addresses requesting public (not private) information, held by public authorities and which have been created during work or related to the work of the public authority body, and which are contained in certain documents, related to everything that the public has a *justified interest to know* (Serbian FOIA Article 2, Paragraph 1). Viewed from the perspective of Article 19, Paragraph 2 of the ICCPR, the condition of justified interest could be interpreted as narrowing the scope of the freedom to seek information. A plain meaning interpretation of Article 2, Paragraph 1 of the Serbian FOIA allows for a conclusion that access to information is subject to the fulfillment of the justified public interest condition, which is in contradiction with the nature of a freedom to seek information and the principle of free access to information. Thus, the removal of the qualifying language regarding a “justified interest to know” from Article 2, Paragraph 1 is recommended.

*Comments by the Commissioner for Information
of Public Importance of the Republic of Serbia:*

It is stated in the Analysis that the “literal interpretation of Article 2, Paragraph 1 of the FOIA, allows for a conclusion that access to information is subject to the fulfillment of the justified public interest condition, which is in contradiction with the nature of a freedom to seek information and the principle of free access to information,” and that this is not in accordance with the International Covenant on Civil and Political Rights.

The Author concluded that, contrary to the Recommendation (2002)² of the Council of Ministers to the Member States on Access to Official Documents, the precondition of a justified interest is introduced as a mandatory fourth element of information of public importance, and that absence of this element alone is a reason for refusing a request of an applicant, independent of the reasons prescribed for restricting the right to information of public importance.

This conclusion cannot be accepted if one considers the following: Article 5 of the Serbian FOIA guarantees the right of free access to information of public importance to everyone, with no exception; Article 4 states that everyone has a justified interest which does not need to be proved (see also Article 15, Paragraph 4). The public authority body is allowed to restrict this right only subject to conditions prescribed by Article 8 of the FOIA and for the reasons listed in Articles 9, 13 and 14 of FOIA, and has the obligation to prove that the applicant abused this right.

Following the intention of the entire law, and particularly the stated provisions, the absence of a justified interest may be proved only in the context of Articles 9, 13 and 14 of FOIA, in which the reasons for restriction of the right to free access to information are enumerated. Thus, the “justified interest” language of Article 2, Paragraph 1 cannot be considered an additional reason, which, on its own, is sufficient to restrict the right to information.

We may, however, agree that, in order to remove any doubt, when establishing the concept of information of public interest in Article 2, the element of the *justified interest of the public to know* should be omitted as irrelevant.

Free access to information as stipulated by FOIA means that this right is open to *everyone*, without discrimination (and regardless of the possible public interest). The nondiscriminatory access is well regulated by Serbian FOIA, particularly in Articles 5 and 6.

Article 5 of the Serbian FOIA establishes that everyone (private or legal entity) is entitled to be informed whether a public authority holds specific information of public importance, i.e., whether the information is otherwise accessible, the right to access information of public importance by being allowed to view a document containing information of public importance, the right to a copy of that document, and the right to receive a copy of the document upon request, by mail, facsimile, electronic mail, or another form.⁷

According to Article 6 of the Serbian FOIA, everyone shall be able to exercise the rights dictated therein under equal conditions, notwithstanding their citizenship, temporary or permanent residence, seat or personal attribute such as race, religion, nationality, ethnicity, or gender.⁸ FOIA Article 7, Article 16, Paragraph 8, Article 17, Paragraph 4, and Article 18, Paragraph 4, also ensure that certain groups, i.e., disabled persons and journalists, have equal access to documents containing information of public importance.⁹

7 Article 5: Everyone shall have the right to be informed whether a public authority body holds specific information of public importance, i.e., whether it is otherwise accessible. Everyone shall have the right to access information of public importance by being allowed insight in a document, containing information of public importance, the right to a copy of that document, and the right to receive a copy of the document upon request, by mail, fax, electronic mail, or in any other way.

8 Article 6: Everyone shall be able to exercise the rights in this Law under equal conditions, notwithstanding their citizenship, temporary or permanent residence, i.e. seat, or personal attribute such as race, confession, nationality, ethnicity, gender, et al.

9 A complete copy of the Serbian FOIA can be found as an annex to this report.

Article 7 of FOIA, which prohibits discrimination against journalists and media outlets,¹⁰ follows the opinion of the Human Rights Committee in the case of *Gauthier v. Canada*, which established that failing to allow a certain journalist equal access to journalists' premises in Parliament was a breach of his rights under Article 19 of the ICCPR. In a situation where more than one journalist or a media outlet have submitted requests for access to information, an authority must not place any journalist or a media outlet in a more favorable position by giving exclusive or preferential access to exercise the right to access information of public importance.

From the standpoint of Article 19 of the ICCPR, in connection to Article 25 of the ICCPR, this means that for the realization of public participation in managing public matters it is important that the freedom to seek and impart information is made possible. This also includes the freedom of the press and other media outlets to comment on public matters.

In this respect, it should be noted that the principle of participative democracy of modern states has been set forth in Article 51, Paragraph 1 of the new Constitution of the Republic of Serbia, which states:

Everyone shall have the right to be informed accurately, fully and timely about issues of public importance. The media shall have the obligation to respect this right.

The provision of Article 18, Paragraph 4 of the Serbian FOIA states that if a public authority holds a document containing the requested information in the language in which the request was submitted, it shall be obliged to allow the applicant to view and make a copy of the document in the language in which the request was submitted.¹¹ The Law also allows for a document to be provided in a language that is not one of the official languages in Serbia and in which the request has been made. Also noteworthy is that in accordance with Article 22(5) of the Law, a breach of Article 18, Paragraph 4 is also one of the reasons for filing a complaint.¹² This gives Article 18, Paragraph 4 of the Serbian FOIA additional strength and is a commendable legislative solution because it protects the rights of those who speak foreign languages.

10 Article 7: A public authority may not give preference to any journalist or media outlet, when several have applied, by allowing only him/her or allowing him/her before other journalists or media outlets to exercise the right to access information of public importance.

11 Article 18, Para. 4: If a public authority holds a document containing the requested information in the language in which the request was submitted, it shall be obliged to allow the applicant insight and make a copy of the document in the language in which the request was submitted.

12 Article 22: An applicant may lodge a complaint to the Commissioner within 15 days upon receipt of the public authority decision if: (5) The Public authority does not allow insight in the document containing the requested information, i.e., does not issue a copy of the document in the manner prescribed in Para. 4 of Article 18 of this Law.

*Comments by Nemanja Nenadic, Transparency Serbia
(Coalition for Free Access to Information of Public Importance):*

The right stipulated by Article 18, Paragraph 4 is discussed on the previous page but the area in which this right is used is incorrectly stated. Primarily, the right is important to representatives of national minorities and not to those who “speak foreign languages,” as the public authority body is obliged to provide a document in a language in which the request was submitted, should it possess a document in that language. This provision, accordingly, regulates situations where a request is submitted in one of the languages in official use in a public authority body (for example, a language of a certain minority group used in a certain municipality). On the other hand, situations concerning provision of documents in foreign languages have not been specifically regulated within the Law. Such documents (for example, copies of international agreements which were drafted in English) in fact have the same status as all other documents and may be requested by filing a request in the language which is in official use in the public authority body (Serbian or a language of a certain national minority group).

Article 16, Paragraph 8 of the Law is also praiseworthy as it allows a person who is unable to view a document containing the requested information on his/her own an opportunity to view the document with the assistance of an escort.¹³ This situation would arise in cases where the applicant is a disabled person, or cannot speak any of the official languages of the Republic of Serbia. Assistance for persons who have the above-mentioned rights must be provided, in accordance with Article 38 of the Law¹⁴, by a person authorized within the public authority body to deal with access to information of public importance. If the authority does not appoint such a person, the head of the public authority must provide such assistance to the applicant.

Finally, Article 17, Paragraph 4 of the Law should be noted as another example of affirmative duties. Under this provision, journalists who seek information as part of their professional assignment, human rights non-governmental organizations who are requesting a document for the purpose of fulfilling the goals of the organization, and all persons who request information in connection with imperilment, i.e. protection of public health and the environment, shall be exempt from paying costs of duplication or sending.¹⁵

13 Article 16, Para. 8: A person, unable to have insight in a document containing the requested information without an escort, shall have the opportunity of insight with the assistance of an escort.

14 Article 38: A public authority shall appoint one or more official persons (hereinafter: authorized person) to respond to requests for free access to information of public importance. The authorized person shall: (1)...provide the necessary assistance to the applicants to exercise their rights regulated by this Law.

15 Article 17, Para. 4: Journalists, requesting a copy of a document for professional reasons, and non-governmental organizations, focusing on human rights and requesting a copy of a docu-

From the above, it can be concluded that the right of access to information of public importance in the Republic of Serbia is available to everyone, every private individual or legal entity. In this regard, it should be emphasized that, by its character, the right of access is a right of citizenship, but also a human right, which is in accordance with ICCPR standards. Thus, it is available, without discrimination, to everyone who is in the territory and under the authority of the Republic of Serbia. This is also confirmed by Article 51, Paragraph 2 of the new Constitution which states: *everyone* has the right to access information held by the public authority bodies and organizations vested with public authority, in accordance with the law. (Emphasis added). From the aspect of the principle of equal treatment and affirmative action, Article 7, Paragraph 8, Article 16, Paragraph 4, and Article 18 of FOIA should especially be praised. It should also be emphasized that the scope of the legislative provisions that address the nondiscriminatory character of the right of access is broader than that of the ICCPR as they also extend to legal entities.

In a further comparison between the Serbian FOIA and the ICCPR, Article 19, Paragraph 2 of the ICCPR raises the question of whether a literal interpretation of Article 5, Paragraph 2 (of the ICCPR) compared with Article 18, Paragraph 2 of FOIA, fulfills the standards set by the ICCPR, that it is possible to receive information “either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Article 5, Paragraph 2 of FOIA states that everyone shall have the right to access information of public importance and the right to a copy of that document, as well as the right that a copy of the document be received upon request by mail, facsimile, electronic mail or in another way, while Article 18, Paragraph 2 of FOIA stipulates that a public authority shall issue a copy of the document containing the requested information in the form in which the information is (de facto) in.

According to the literal interpretation of these provisions, an applicant requesting the information does not have the option to choose the form of receipt of the information. The inadequacy of the Serbian FOIA in this respect should be amended because the right of an applicant to choose the form in which he receives the requested information, if possible due to the (technological) capacity of the public authority, is a significant element of the freedom to seek information under Article 19, Paragraph 2 of the ICCPR.

The exercise of the right to free access to information described thus far may, in accordance with Article 19, Paragraph 3 of the ICCPR, be subject to certain restric-

ment for the performance of their registered activities, and all persons that request the information due to the imperilment, i.e. protection of public health and environment, shall be exempted from the obligation of reimbursement in Para. 2 of this Article, except in the case referred to in Article 10, Para. 1 of this Law.

tions which shall be strictly provided by law and necessary for the respect of the rights and reputations of others, for protection of national security, or for public order, health or morals. It should be noted that, in comparison to the aforementioned, the exceptions established by FOIA are somewhat broader, as the economic interests of the state and secrecy of information have also been included among the exceptions. It should also be emphasized here that the statutory exceptions are to some extent broad, and from the perspective of the implementation of the principles contained in the ICCPR, are not sufficiently specified by FOIA. This problem could be eliminated to some extent by the introduction of separate laws to the Serbian legal system which would better define these exceptions.

For this reason, public authority bodies competent to decide on requests for information have been given broad discretion to interpret the restrictions set forth in Articles 9, 13 and 14. Such decision-making may be discretionary, discriminatory and contradictory to the principles of an open society and transparency of the work of public authority bodies. Such decisions may also lead to the restriction of the right to participate in the conduct of public affairs, stipulated by Article 25 of the ICCPR.

The above-stated should, however, be considered in light of Article 9 of FOIA¹⁶, which requires public authorities to use the harm test when determining whether a certain exception exists, or the three-prong test, as specified by Article 8, Paragraph 1 of FOIA¹⁷. This means that the rights under the Serbian FOIA could exceptionally be subject to restrictions specified therein, if deemed necessary in a democratic society to prevent a serious violation of an overriding interest based on the Constitution or the law. This is compatible with the previously-stated provision of Article 19, Paragraph 3 of the ICCPR. Thus, from the perspective of the compatibility of FOIA with Article 19 of ICCPR, it should be concluded that the incorporation of

16 Article 9: A public authority shall not allow the applicant to exercise the right to access information of public importance, if it would thereby:

- 1) Expose to risk the life, health, safety or another vital interest of a person;
- 2) Imperil, obstruct or impede the prevention or detection of criminal offense, indictment for criminal offense, pretrial proceedings, trial, execution of a sentence or enforcement of punishment, any other legal proceeding, or unbiased treatment and a fair trial;
- 3) Seriously imperil national defense, national and public safety, or international relations;
- 4) Substantially undermine the government's ability to manage the national economic processes or significantly impede the fulfillment of justified economic interests;
- 5) Make available information or a document qualified by regulations or an official document based on the law, to be kept as a state, official, business or other secret, i.e., if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and outweigh the access to information interest.

17 Article 8, Para. 1: The rights in this Law may be exceptionally subjected to limitations prescribed by this Law if that is necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or Law.

the harm test and the three-prong test into the law was appropriate and necessary for restricting the (too) generally stated exceptions from access to information.

For the purpose of a more suitable legislative solution (as well as from the standpoint of acquiring further specificity with regard to Article 19, Paragraph 3 of the ICCPR), amending the law to further specify the exceptions should be considered. One option is to cross-reference existing laws to define and stipulate each exception. For example, the Slovenian Access to Public Information Act, in the first line of Article 6, Paragraph 2, defines as an absolute exception “data that are in accordance with the law regularizing secret information, marked with the two highest levels of secrecy.”

*Comments by Nemanja Nenadic, Transparency Serbia
(Coalition for Free Access to Information of Public Importance):*

The author suggests a further specification of exceptions from the right to access information which should be done through amendments to FOIA. In my view, the fact that the exceptions are “stated in a general fashion” need not be an impediment to the exercise of the right to access information in cases where this right could override a need for the protection of another interest (e.g., when the protection is provided through denotation of a certain level of secrecy to a document), as provided by FOIA. It is likely that greater specificity of exemptions would be useful to public authority bodies that act upon requests. What should, however, be taken into consideration is that any absolute exception from the right to access information may be misused, which would mean that the acceptance of the suggestions provided by the authors could lead to limitations of the degree in which the right to access information could be exercised in Serbia. Naturally, various problems may arise when disclosure of information which has been granted secret status is requested. However, as the authors have already addressed this issue, I will not. At the end of the day, from the standpoint of the applicant, the exercise of the right to access a document is totally immaterial if a document has been designated, for example, the first or second level of confidentiality. If the secrecy is justified and the necessity of it being maintained outweighs the right of the public to know, an applicant will not be granted access to such information, and vice versa.

2. Council of Europe

2.1. European Convention for the Protection of Human Rights and Fundamental Freedoms

Similar to the ICCPR, the European Convention for the Protection of Human Rights and Freedoms (hereinafter: the Convention) does not explicitly provide for the right of access to information of public importance, although, according to generally accepted legal principles, states are required to provide only such information which is in their possession (namely, in possession of the public administration).

However, Article 10 of the Convention,¹⁸ does state, in paragraph 1, that everyone has the right to freedom of expression. That right includes the *freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*. (Emphasis added). In accordance with Paragraph 2, exercise of these freedoms also includes duties and responsibilities and thus *it may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*.

Regarding the stipulation involving access to information of public importance, compared to Article 19 of the ICCPR, the Convention provides for the division of this right into two categories only: the right to receive information and ideas, and the right to impart them.

Bearing in mind that accordingly this provision of the Convention does not regulate the right to seek information, it therefore only extends to the passive receipt of information. This particular difference in the formulation of both documents is one of the reasons that the right of access to information (which does not present personal data of the applicant, or does not contain such data) has never been explicitly acknowledged in the practice of the European Court of Human Rights (hereinafter: the Court).

Interestingly, the Court still does not have a uniform opinion whether Article 10 of the Convention includes the right of access to information of public importance. To date, the Court has been more inclined to acknowledge the right of access to information containing personal data of individuals according to the right to private and family life under Article 8 of the Convention, thereby avoiding the application of Article 10 of the Convention. For that reason, when we assess the relationship of the Serbian FOIA and Article 10 of the Convention, we must consider the previously-stated comments in connection with the ICCPR, the scope of which includes the right to request.

2.2. Recommendation (2002)2 of the Council of Ministers to the Member States on Access to Official Documents

The Council of Europe¹⁹ (hereinafter: CoE) demonstrates a less conservative position than the Court by stating that everyone is entitled to the right to freedom

18 The Convention was adopted in 1950 and is applicable in the Republic of Serbia.

19 Significant documents that have been adopted in this connection are Recommendation No. 582 (1970) on Mass Communication Media and Human Rights, Recommendation No. 584 (1979) on Public Access to Government Documents and Freedom of Information, Recommendation No. 19 (1981) to Member States on the Access to Information Held by Public Authorities, Recom-

of information, including the freedom to receive information. The most important document of the Council of Europe in this field is Recommendation (2002)2 of the Council of Ministers to Member States on Access to Official Documents (hereinafter: the Recommendation), adopted in 2002. Essentially, it is based upon Article 19 of the UN Declaration and Article 19 of the ICCPR which, in comparison to Article 10 of the ECHR, provide a broader right of access to official information, as stated in point 4 of the Explanatory Memorandum to Recommendation (2002)2 of the Council of Ministers to Member States on Access to Official Documents (hereinafter: the Explanatory Memorandum). The provisions of the Recommendation contain and specify the right to request official information. The Recommendation is derived from the significance of having non-discriminatory access to information in matters that are of public interest for transparency of the public administration in a pluralistic and democratic society.

2.2.1. Obligated Subjects

According to the Recommendation, performance of a public function is the basic criterion upon which a certain natural or legal person is included into the scope of obligated subjects.

Thus, the Recommendation defines the principle of “public authority” such that the mentioned principle includes the government and the administration at the state, regional or local level, as well as natural or legal persons, who, in accordance with law, perform public functions or exercise administrative authority. Accordingly, natural or legal persons who perform public functions or are financed from public funds (Principle I) are also included, but member states of the Council of Europe, including Serbia, should determine the degree to which the stated applies to legislative and judicial bodies (Principle II).

Article 3 of the Serbian FOIA determines that public authority bodies are state bodies, territorial autonomy bodies, and local self-governance bodies vested with the execution of public authority, as well as legal entities founded by or funded wholly or predominantly by a state body. Thus, it is commendable that according to such legal definition the scope of subjects bound by FOIA includes both legislative and judicial bodies (which are traditionally less prone to disclosure of information). It should, however, be noted here that the scope of subjects bound by Serbian FOIA does not include natural persons vested with exercising public authority. Compared to Principle I of Recommendation (2002)2, this means that the scope of subjects obligated by the Law is somewhat narrower. For that reason, consideration should

mentation No. 1037 (1986) on Data Protection and Freedom of Information, Recommendation of the Council of Ministers No. 10 (1991) on the Communication to Third Parties of Personal Data Held by Public Bodies, and the Declaration of the Council of Ministers on Freedom of Expression and Information.

be given to amending FOIA to include natural persons vested with exercising public authority among the obligated subjects.

2.2.2. *Scope*

According to Principle I of the Recommendation, an “official document” shall mean all information recorded in any form, drafted or received (by third parties) and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation, the latter presenting the negative aspect of the definition.

Accordingly, Recommendation (2002)2 does not extend to draft documents or working papers. It also does not extend to private information and documents of officials that do not relate to their execution of public functions, that is, their work (Point 10 of the Explanatory Memorandum). Since within the scope of this definition official documents containing personal data could also be accessed, it should be emphasized that the Recommendation does not deal with restrictions of the right to access official documents, referred to by the Convention of the Council of Europe No. 108, dated 28 January 1981 on Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter: Convention No. 108) (Point 2 of Principle II). This does not mean that access to such documents is precluded, but that in such cases it is necessary to act in accordance with the rules of the Convention No. 108.

*Comments by Nemanja Nenadic, Transparency Serbia
(Coalition for Free Access to Information of Public Importance):*

With respect to the comment provided regarding working papers, it is possible that there is need for harmonization of the Law with the Recommendation. This should not, however, be done in a manner that would limit the exercise of the right to access information. In my opinion, it should be taken into account that FOIA at present does not create obstacles for requesting and getting access to “working papers” which would occur only when a document has not been finalized (other legal requirements would also require fulfillment).

It is particularly important to highlight the fact that the Recommendation does not regulate, in detail, the manner of conduct in situations where a document is part of an electronic database. For this reason, regulation of this matter is left to the states themselves.

Information of public importance, according to the definition of the Serbian FOIA, is information held by a public authority body, created during work or related to the work of the public authority body, contained in a document, and related to everything that the public has a justified interest to know.

This definition is in accordance with the previously stated principles of the Recommendation. According to the given definition, it is irrelevant whether the source of information is a public authority body or another person. Furthermore, the medium containing the information is also irrelevant. Finally, neither the date when the information was created, nor the method of obtaining information, nor another feature of the information is relevant.

From the perspective of the legislation, what is relevant is that information and documents which are a part of an electronic database are of public importance. FOIA, however, does not regulate the manner in which they should be handled. This leads to the conclusion that in the Republic of Serbia no particular rules would apply in a case where such a document would be processed. This is not in contradiction with the Recommendation.

The FOIA definition of “information of public importance” thus contains the following elements – the public authority body holds the information; the information has been created by the public authority body or in connection with its work; the information is contained in a particular document (in whatever form) – which are in accordance with the definition of Recommendation (2002)2.

Nonetheless, the Serbian FOIA adds a fourth element that is not in accord with the Recommendation. This element is the presumption of a *justified public interest*, which may be understood as narrowing the definition contained in Principle I of the Recommendation. A literal interpretation of Article 2, Paragraph 1 suggests that even where all three constitutive elements of the information of public importance are satisfied, access to information could still be denied if the justified public interest requirement was not met. This is contrary to the principle of free access to information, according to which official information is available to everyone without discrimination, regardless of the (justified) interest.

A similar conclusion could be reached in view of Points 16 and 17 of the Explanatory Memorandum. For this reason, it would be beneficial if the vagueness of the statute in this respect be removed. As Article 4 lists in detail situations in which the justified public interest is automatically presumed (threat and protection of public health and environment) and, at the same time, determines that the public authority body may in other cases prove the contrary, by relying on a plain meaning interpretation it may be concluded that, in other cases, the condition of justified interest may be refuted and that the assessment in that respect is vested with the public authority body concerned.²⁰

20 Article 4: It shall be deemed that there is always a justified public interest to know information held by the public authority, in terms of Article 2 of this Law, regarding a threat, i.e., protection of public health and the environment, while with regard to other information the public authority

This may help decision-making in cases where the requested information is in a document which is in draft form or is a working paper. (It should be noted here that FOIA does not regulate this situation, contrary to the Recommendation). This, however, cannot be a sufficient reason for envisaging such a condition and restricting the principle of free access to information. For that reason, and from the perspective of compatibility of FOIA with Recommendation (2002)², changes to the law that would eliminate the conditioning of access to information on express justified public interest, which the public authority body could decide on its own, should be considered. Likewise, with respect to the Recommendation, it would also be necessary to incorporate into FOIA specifically formulated provisions on access to information in cases where the document is in draft form or is a working paper.

*Comments by Nemanja Nenadic, Transparency Serbia
(Coalition for Free Access to Information of Public Importance):*

The author incorrectly concludes that a public authority body decides freely on “the stated justified interest of the public.” A body does not decide about such interest at all, as its existence is, according to FOIA, presumed and accordingly does not need to be proved. A body does decide on the existence of other interests, however, they do not decide freely, but within the framework of the exceptions set out by FOIA. The stated comment of the author is, thus, without standing.

For comments by the Commissioner for Information of Public Importance of the Republic of Serbia, please see page 13.

2.2.3. The Basic Principles

According to the Recommendation, everyone, both natural and legal persons, has the right of access to official documents without discrimination. Right of access, furthermore, does not affect any intellectual property right attached to the information which is subject to disclosure (Principle III of the Recommendation). Furthermore, copyright cannot be a reason for refusing a request for viewing an official document, while documents which are an original work or which contain an original work, are still under the protection of copyright law, primarily from duplication. Access to documents is the general rule or principle, while restriction of access (discussed below) is an exception.

² holds, it shall be deemed that there is a justified interest of the public to know, in terms of Article 2 of this Law, unless proven otherwise by the public authority.

Article 5 of the Serbian FOIA is in accordance with the above stated, as it stipulates that everyone shall have the right to be informed whether a public authority holds specific information of public importance, or, whether it is otherwise accessible. Likewise, everyone shall have the right to access a document containing information of public importance, the right to copy that document, and the right to receive a copy of the document upon request, by mail, facsimile, electronic mail, or another method. The listed rights, in accordance with Article 6 of the Serbian FOIA, belong to everyone under equal conditions, notwithstanding their citizenship, temporary or permanent residence, legal status, or personal attribute such as race, confession, nationality, ethnicity, gender, etc.

Considering the above, it may be concluded that the right of access to information of public importance in the Republic of Serbia is provided without discrimination to everyone, to both natural and legal persons, in accordance with Principle III of Recommendation (2002)². Moreover, from the perspective of enabling such non-discriminatory treatment, one should emphasize Article 7, Article 16, Paragraph 8, Article 17, Paragraph 4, and Article 18, Paragraph 4 of FOIA which, in these sections of the law, introduces affirmative duties. For example, Article 7 further prohibits discrimination against the media and media outlets; Article 16, Paragraph 8 introduces the principle of providing assistance to applicants who are themselves unable to obtain insight into a document that contains certain information; Article 17, Paragraph 4 exempts certain persons who are entitled to seek information from having to reimburse necessary costs that can be calculated by public authority bodies for making a duplication and sending a copy; while Article 18, Paragraph 4 provides for making a document also available in a language which is not one of the official languages, as long as the document exists in a language in which a request has been submitted.

These issues have been addressed in detail in the beginning of this chapter (United Nations Universal Declaration on Human Rights). Comments expressed therein should be considered when assessing the Serbian FOIA in relation to Recommendation (2002)².

When comparing Principle III of Recommendation (2002)² and the statutory framework established by the Serbian FOIA, it is necessary to emphasize that FOIA does not specifically regulate access to documents which are, concurrently, original works. Thus, it would be beneficial if the law is amended to also address this situation.

2.2.4. Restriction of Access to Official Documents

Access to documents is the general rule or principle, while restriction of access is an exception. It then follows, from the basic principle, that an individual should know whether a public authority body holds a specific document (and whether that

document would be made available to him/her, if needed). For this reason the Recommendation lists the allowed exemptions of the right to access official documents, which primarily follow from Articles 6, 8 and 10 of the Convention (ECHR) and the Convention No. 108. The Recommendation specifies that exceptions must be set out precisely in law, be necessary in a democratic society, and be proportionate to one of the following bases for exclusion (Point 1 of Principle IV of the Recommendation):

- national security, defense and international relations;
- public safety;
- prevention, investigation and prosecution of criminal activities – the obligation may also apply to certain autonomous regions of a country, as explained in Point 22 of the Memorandum of Explanation;
- privacy and other legitimate private interests. In this respect, it is not necessary for all privacy interests to be covered by the Convention No. 108;
- commercial and other economic interests, private or public;
- the equality of parties concerning court proceedings;
- nature;
- inspection, control and supervision by public authorities;
- the economic, monetary and exchange rate policies of the state;
- confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

In connection with the listed exceptions, Point 2 of Principle IV of the Recommendation states that access to a document may be refused if the disclosure of the information contained in the official document would harm or would be likely to harm any of the interests mentioned above, unless there is an overriding public interest in disclosure. Thus, Principle IV, Point 2 of the Recommendation introduces the need for a harm test and a balancing test. According to Point 3 of Principle IV of the Recommendation, the states would need to consider the introduction of time restrictions for exceptions, which should conform with Point 1 of Principle IV, proportionate to the basis for exclusion.

As this issue is considered separately and in more detail below, only general remarks on the compatibility of the Serbian FOIA to the Recommendation in this respect will be presented here. In general, the exceptions codified by the Serbian FOIA in Articles 9, 13 and 14 and those set forth in Recommendation (2002)² in Principle IV are not the same, however exceptions contained in both sources are, with respect to the manner in which they have been formulated, very general and overlap. Since the Serbian FOIA does not list inspection, control and supervision by public authorities, the environment, or the confidentiality of deliberations within or between public authorities during the internal preparation of a matter as exemptions from

free access to information, it may be concluded that FOIA is more open in this respect than the Recommendation. However, instead of, for example, an exception for confidentiality of deliberations within or between public authorities during the internal preparation of a matter, which is not stipulated by FOIA, the Law sets out the following exceptions in Article 9(5) – secret data, business secret and other confidential data, accessible only to a specific group of individuals, and whose disclosure could have serious legal or other consequences, or could otherwise prejudice interests which outweigh the interests for access to information of public importance. Due to the fact that these exceptions are formulated generally and could be subject to discretion and broad interpretation, Point 1 of Principle IV of the Recommendation should be considered the starting point for defining certain exceptions. This may be done by referencing relevant laws in certain areas to regulate the codified exceptions by defining them and thus determining their scope.

In accordance with Point 2 of Principle IV of the Recommendation, the Serbian FOIA sets forth in Article 9 the harm test for each of the exceptions. The statutory exceptions listed in Article 9 may therefore only be used when there is a possibility that the disclosure of information could prejudice a certain interest that is protected by one of the exceptions. It is therefore necessary to emphasize that the exceptions relating to abuse of free access to information of public importance (Article 13) and protection of privacy (Article 14) are not subject to the harm test. They are, nonetheless, subject to the balancing test, which may be used as a basis for exceptions to the refusal to provide access to information as stipulated in Article 9. From the perspective of Point 3 of Principle IV of the Recommendation, it may be useful for the states to consider introducing time limits for exceptions which would be proportionate to the exclusion.

2.2.5. Request and Procedure

Recommendation (2002)2, in Principle V, stipulates that the FOIA applicant is not required to provide reasons for requesting access to information. Thus, the existence of a specific interest for filing a request cannot be solicited, and the conditions for filing a request need only be minimal. Any public authority body holding a document in its possession should handle each request on an equal basis (Points 1 and 2 of Principle VI). Requests should be handled promptly and, if possible, within any time limit which may have been specified beforehand (Point 3 of Principle VI).

If it is not possible to process the requests within the prescribed deadline, the applicant should be notified. If the requested document is not in the possession of the public authority body, it should, wherever possible, refer the applicant to a public authority body that holds the document, and forward the request to the competent public authority body (Points 1 and 4 of Principle VI). The public authority should, in this case, assist the applicant in identifying a document that holds the requested

information. However, if this is not feasible, the public authority is not under a duty to comply with the request (Point 5 of Principle VI).

A request may be refused if it is manifestly unreasonable (including abuse of process, requesting too many documents, etc., as listed in Point 43 of the Explanatory Memorandum, in connection to Point 6 of Principle VI of the Recommendation). In case of a refusal or partial refusal of the request, a reasoned decision is required according to Point 7 of Principle VI of the Recommendation. Should the request not be handled within a prescribed time period, or is fully or partially refused, it is necessary for the applicant to have access to a prompt and inexpensive review procedure before a court of law or another independent or impartial body. Applicants may also be provided with an option to request reconsideration by the same body (Principle IX).

According to Article 15, Paragraph 4 of the Serbian FOIA, an applicant is not obligated to list reasons for the request. Paragraphs 7 and 8 of Article 15 specify that a public authority body is obligated to allow an applicant access to information even if a request is not submitted in the prescribed form of the public authority body, or if it is lodged orally, on the record (deadlines and further procedural steps stipulated for requests submitted in a written form will also be applicable here).

It may, therefore, be stated that the law in this respect fully and adequately meets the requirements stated in Points 1 and 2 of Principle VI of the Recommendation. The same applies to Point 3 of Principle VI, as the Serbian FOIA prescribes a 15-day deadline, starting from the day when the request was filed, in the course of which a public authority body must allow the applicant to view the original document or send out a copy to the applicant (Article 16, Paragraph 1). The deadline may be extended, for justified reasons, to up to 40 days from the day of receipt, and the applicant must be notified of this extension (Article 16, Paragraph 3). In cases where a request refers to information significant for the protection of life or freedom of a person or to information concerning peril or protection of the population and environment, the statutory deadline, within which the public authority body is obliged to inform the applicant that it has forwarded the information or has granted him/her access to the document, is 48 hours.

The Serbian FOIA follows the Recommendation in this respect, as it provides for a prompt and informal consideration of a request. In cases concerning particularly significant information, Article 16, Paragraph 2 imposes specific, shorter deadlines, the breach of which may be appealed (Article 22, Paragraph 1 Sub-Paragraph 2). It is also, at this point, noteworthy to commend Article 16, Paragraph 8 of FOIA from the perspective of providing applicants with assistance in relation to matters concerning access to information (Point 5 of Principle VI). Article 16 provides es-

court assistance for those applicants who are unable to have insight into information without such assistance. The applicants also have at their disposal a favorable provision of Article 18, Paragraph 4, which allows for making documents available in a language which is not one of the official languages, should a document exist in a language in which a request has been filed.

From the perspective of FOIA compliance with Principle VI of the Recommendation, it is important to draw attention to Article 19, which regulates situations where a public authority body is not in possession of a requested document. In this case, the public authority body is to inform the applicant and the independent appellate body in matters of access to information of public importance (the Commissioner) as to which body, in its opinion, has the requested document in its possession, and is to refer the request to the Commissioner. The Commissioner shall refer the request to a competent body, unless an applicant requests otherwise. Although this solution is in accordance with the Recommendation, it is questionable whether it is practical, when viewed from the perspective of promptness in handling requests.

With regard to the appellate procedure determined by FOIA, it should be noted that it is in accord with Principle IX of Recommendation (2002)². The reasons for filing an appeal are listed in the law (Article 22). An appeal may be filed, *inter alia*, against a public authority body if it fails to reply to a submitted request (“silence of the administration”), if a request is fully or partially rejected, or if a public authority body fails to decide upon a request within a deadline prescribed by the statute. The appellate procedure may take place both before a court of law, or another independent and impartial body (in this case, the Commissioner). The Commissioner decides on all appeals, except those against a decision of the National Assembly, the President of the Republic, the Government, the Supreme Court, the Constitutional Court and the Republic Public Prosecutor (Article 22), against whom it is only possible to initiate an administrative dispute (Article 22, Paragraph 3). An administrative dispute may be initiated against a decision of the Commissioner (Article 27).

The above-stated corresponds to Principle IX of the Recommendation, which stipulates the availability of a complaint procedure before a court of law or another independent and impartial body. It is questionable, however, whether it is reasonable and economical to have a (non)uniform procedure, which has a different appellate process applicable to decisions made by the highest state agencies as opposed to the one applicable in other cases.

First of all, there is uncertainty from the viewpoint of a uniform systematization and an equality of decisions of all competent bodies, and, consequently, a unified competence of the Commissioner, as an independent appellate body in the field of access to information established by the Serbian FOIA. As all of the mentioned

procedures are governed by the rules of administrative procedure (Law on General Administrative Procedure; hereinafter: LGAP), unless stated otherwise by the Serbian FOIA, they must be conducted in accordance with the LGAP and all decisions must be reasoned, while *silence of the administration* shall be considered denial of a request for access. Point 7 of Principle VI of the Recommendation, which requires the public authority body to provide reasons for refusing a request, has also been satisfied. (More on this in the chapter written by Janez Klemenc).

With respect to Point 6 of Principle VI of the Recommendation, Article 13 of the Serbian FOIA specifically regulates manifestly unreasonable requests based on abuse of process. The public authority body shall not allow an applicant to exercise the right of access to information if an applicant is abusing the right to access information, and, particularly, if a request is irrational, frequent, when the same or previously obtained information is being requested again or when too much information is being requested. In general, this has been regulated in accordance with the Recommendation. The clarity and specificity of the legislative framework in this respect is further discussed below.

2.2.6. *The Forms of Access*

The Recommendation also addresses different forms of access to official documents: inspection of an original document or provision of its copy. In accordance with Principle VII, a public authority body should allow inspection of the original, or provide a copy of it, taking into account as much as possible the preference expressed by the applicant (Point 1). The applicant must choose the form in which he/she would prefer to receive a document. The public authority body should, within reasonable limits, consider this request.

For instance, a request of an applicant for a document in a certain form could be refused if the public authority body does not have the technical means to transform a document into a desired form, if the public authority body would violate the intellectual property rights, etc. The public authority body may refer the applicant to alternative sources if the document is easily accessible (Point 3). If only parts of a document are subject to restriction, the public authority body is obligated to allow the applicant access to the part of the document to which restriction does not apply, clearly indicating any omissions or deleted parts of the document. If a partial version of the document is misleading or meaningless, the public authority body may then refuse access to such document (Point 2).

In this respect, it is necessary to draw attention to the deficiencies of the Serbian FOIA. A literal interpretation of Article 5, Paragraph 2, read together with Article 18, Paragraph 2, leads to a conclusion that it is not possible for an applicant to choose a form in which he/she would wish to receive a document as the public

authority body issues the document in the form in which the information actually exists. Since this issue has already been discussed in the previous subchapter of this chapter titled Organization of the United Nations, we only wish to highlight the need to amend the law so that an applicant is, in accordance with the Recommendation, able to choose the form in which the copy of the document would be provided.

Point 3 of Principle VII of the Recommendation stating that an applicant may be referred to alternative sources if the document is easily accessible at this location, is regulated by Article 10 of the FOIA law, which provides that in cases where requested information has already been published and made accessible, the applicant will be informed of the medium, location and time such information had been published by the public authority body, unless it is common knowledge.

For cases where restriction of access applies only to a part of a document, Article 12 of the FOIA law provides for so-called “partial access”. The public authority body allows the applicant access to the part of the document to which a restriction does not apply. In this respect, attention should be drawn to the fact that, contrary to the Recommendation, FOIA law does not require that the omitted or erased parts of the document be clearly marked. The FOIA law also does not contain provisions dealing with refusal of a request based on the fact that the contents of the document could, due to partial access, be misleading or meaningless.

From the perspective of the harmonization of FOIA with Points 1 and 2 of Principle VII of the Recommendations, it would be beneficial for the above to be amended.

2.2.7. Costs

Viewing the original document at the premises of the public authority body should, according to Principle VIII of the Recommendation, be free of charge, while an applicant could be charged for reasonable and actual costs incurred by the public authority. This is in accordance with the general trend in modern states that the inspection is free of charge, and that the public authority bodies are not allowed to make profit by charging for copies (excluding the necessary costs).

Similarly, the Serbian FOIA (Article 17, Paragraph 1) requires that the inspection of the document containing the desired information is free of charge, and that, in accordance with Paragraph 2, only necessary costs will be charged for duplication or sending of documents. Considering the literal interpretation of the stated article and provision of Article 17, Paragraph 4, the aforementioned costs must be charged; however, in practice, a public authority body may decide not to charge them. Journalists employed in their official capacity, organizations for protection of human rights, and persons who request a copy of a document relating to a peril or protec-

tion of the health of the population and environment (Article 17, Paragraph 4 of the Law) shall be exempt from payment of costs for copies of documents.

In this respect, from the standpoint of the Recommendation, Article 22, Paragraph 3 should be commended, because it allows for a complaint to be filed if a public authority body in charge of issuing or intermediating has also charged unnecessary costs.

Considering the principle of equal treatment (economic status of the applicant as a personal circumstance) and the purpose of the principle of free access to information, it would be beneficial to consider the introduction of legal provisions that would regulate situations where a person requesting copies is financially unable to pay the costs of obtaining them.

2.2.8. Additional Measures

Principle X and XI of Recommendation (2002)² set forth additional measures that are significant for an efficient exercise of access to official documents. The following items are of particular importance:

- Informing the public of its right of access to official documents and how that right may be exercised;
- Training of public officials;
- Managing documents efficiently so that they are easily accessible;
- Applying clear and established rules for preservation and destruction of documents;
- Making available information on matters or activities for which the public authority bodies are responsible, which, in accordance with Point 57 of the Explanatory Memorandum, may be done in a form of a register of information;
- Allowing access to information of public interest in advance. Here, public authorities should provide information to the public, on their own initiative, when it is in the interest of transparency of the public administration and its efficiency.

With regard to Principle X and XI of the Recommendation, it should be noted that this area is regulated comprehensively and competently by the Serbian FOIA in Chapter VI of the law, titled “Measures for improving the transparency of work of public authority bodies”.

In accordance with Article 37 of the Law, the Commissioner is obliged to publish and update a manual with practical instructions on the effective exercise of rights regulated by this Law without delay in the Serbian language and in languages that are defined as official languages by law. The manual should particularly contain

the content and scope of rights to access information of public importance, as well as the manner in which these rights can be exercised. The Commissioner shall be obliged to inform the public of the content of the manual. All of the above has been done by the Commissioner.²¹

A public authority body is obligated, according to the provision of Article 38, to appoint one or more persons authorized to respond to requests for free access to information of public importance. If such persons are not appointed, the duties of the authorized persons shall be performed by the head of the public authority body. The authorized persons are responsible for receiving and replying to requests, enabling the inspection of a document or sending its copy, providing assistance to applicants and taking measures to promote the practice of administering, maintaining, storing and safeguarding information mediums.

Based on the directions provided by the Commissioner, the public authority body is obliged to publish, at least once a year, a directory of information of public importance (Article 39) which should particularly contain the following: description of its powers, duties and in-house organization structure; data on the budget and means of labor; data on the types of services it provides; procedure for submitting a request to this state agency and filing complaints to its decisions; overview of requests, decisions of the public authority body, and complaints; data on the places for storing information, on information held by the public authority body, on types of information which are accessible, as well as the description of the procedure of lodging requests; the name of the head of the public authority body and description of his/her authorities; duties and procedures according to which the decisions are made; rules and reasoned decisions of the public authority body on exclusion and restriction of the transparency of the work of the public authority body and explanations thereupon.

In order for the Serbian FOIA to be effectively implemented, the public authority body is obliged to train its staff in connection with the implementation of the law, and to primarily acquaint them with their obligations according to the law (Article 42).

21 The Manual of the Commissioner is derived from the "Guide through the Law on Free Access to Information of Public Importance" that has been developed by a group of non-governmental organizations gathered in the Coalition for Freedom of Access to Information and which has relinquished the publishing rights to the Commissioner.

The Significance of Access to Information of Public Importance in the Legal Order

This section of the assessment begins with a discussion of the definition of “information” and how the Serbian FOIA compares to the international standards on access to information of public importance. Following this discussion, the author assesses the Serbian FOIA’s exceptions and the different balancing tests that must be employed should information be restricted or denied to an applicant. The author then discusses the relevant harm tests used to determine the validity of an exception. Finally, the author makes a brief comparison of the exceptions in FOIA and the various balancing tests that are applied to these exceptions in the laws from Bosnia and Herzegovina, Croatia, and Slovenia.

Access to information of public importance is a relatively new legal area in young democracies. For this reason, states which have long-standing regulations regarding access to information of public importance are most frequently referenced as models (for example, the USA and Scandinavian states). Newly formed legal systems should also take into account international guidelines of organizations to which they belong, such as the Council of Europe, or organizations which they wish to join, i.e., the European Union.

These guidelines are considered established solutions which undoubtedly ensure access to information of public importance and, in the long run, contribute to the development of transparency and openness. In addition to considering widely-accepted international standards, it is also necessary for each state to consider its own individual circumstances when developing a legislative framework of access to information of public importance.

When viewed from a comparative legal perspective, the right to access information of public importance is predominantly an individual constitutional right. All international recommendations in the field advise that the right of access to information of public importance is a fundamental right, to be incorporated primarily into the constitution. This gives this right a higher degree of durability and stability, even in emergency circumstances, and symbolically raises the significance of this right in a given society. The right to access information of public importance is usually considered a component of the right to freedom of expression. This is highly significant, because the nature of human rights and freedoms means that they can be exercised directly based on the constitution. Thus, a constitutional provision is sufficient ground for exercising these rights and freedoms. Other regulations are not necessary.

Compared to societies where access to information is only a statutory right, legal systems where access to information of public importance is a constitutional right show more transparent and open behavior by public authorities in the long-term. All human rights guaranteed by the constitution are mutually connected and carry the same weight. Thus it follows that no human right guaranteed by the constitution can be restricted under the excuse that it is not recognized by the constitution.

This also has practical consequences. Restrictions to the right to access information of public importance are exceptions to freedom of access to information. Different legal interests are protected by exceptions to freely accessible information. Several such exceptions are also a method for protecting other human rights. The most typical example is the exception created for the purpose of protecting personal data or privacy in a broader sense. This exception to free access to information is one of the most frequently used and also presents a right to “information privacy”, which is guaranteed by the majority of modern constitutions. Different balancing tests are used when assessing which of the rights should, in a particular case, be given priority (i.e., test of proportionality, harm test, public interest test). The outcome of such balancing will largely depend on whether two original rights, or a constitutional and a statutory right, are being balanced.

The perception of access to information of public importance as a human right is also significant for people’s awareness of the importance of that right. One of the fundamental axioms of the principle of democracy is that people are aware of their rights (and the connected responsibilities), understand them, and are able to exercise them. The attitude of individuals toward their rights is of crucial importance, among other things, so that the rights are not merely formal, i.e., on paper. Raising the awareness of individuals about their rights may be achieved by including those rights among basic human rights. If the right guaranteed by the constitution is further specified by law, individuals would thus be enabled to exercise the basic right of access to information of public importance in practice.

In the new Serbian Constitution, the right of access to information of public importance has become a constitutional right. According to Article 51, Paragraph 2 of the Constitution, everyone has the right to access information held by the state agencies and organizations entrusted with public authority, in conformity with the law.

Influence of the Definition of “Public Importance” on the Use of Exceptions

Under Article 2 of the Constitution, everyone has the right to access information held by the state agencies and organizations entrusted with public authority, in conformity with the law.

An effort taken toward achieving a greater transparency of the public sector cannot be comprehensive unless supported by a good definition of “information of public importance.” It is crucial that the definition is broad enough to encompass the activities of public authorities in full.

In Europe, in addition to the term “access to information,” the term “access to documents” is also used. As a rule, the term “data” falls under the term “information,” while the term “document” is understood to mean a concrete document.

Despite the clear semantic difference, the two above terms share the same meaning in the area of access to information of public interest, since according to the well-established court practice (The Court of Justice of the European Communities in Luxembourg), the essence of the right is that it enables applicants to request and receive any type of information.

Having said that, it is not important which part of the document contains such information, nor is the form of the document itself relevant. The essence of the right to access is in the access to particular information, regardless of the form in which that information is documented or kept. For this very reason, the international recommendations advise that access to information must be provided regardless of the form in which the information is contained (whether it is a certificate, set of documents, register, audio recording/magnetogram, or visual recordings). Access to information must be provided even if the information is contained in several documents.

Taken as a whole, the definition of “information” contained in Article 2 of the Serbian FOIA follows international standards on access to information of public importance. The law may be deconstructed into four elements:

- 1) A public authority body must have the information in its possession;
- 2) The information must have been created in the course of the work or in connection to the work of a public authority body;
- 3) The information is contained in a particular document;
- 4) There is a “condition of justified interest,” meaning information that refers to anything the public has a justified interest to know about.

A positive definition of “information” is preferable to a negative definition for several reasons. By positively defining information of public importance, we concurrently determine which information does not fall within its scope and cannot be requested under the particular law (such as information held by persons executing private or commercial activities; information that in some respect is completely exempt from the regulatory framework, such as archived material; or private information which does not relate to the work of the public authority bodies, such as a private notebook of a public official which is on his/her desk).

At the same time, a significantly broad scope of information of public importance is more clearly visible from a positive definition. The concept of “information of public importance” is also quite broad when viewed from a comparative legal standpoint. As a general rule, there are only three groups of documents to which the fundamental principle of free access to information does not apply.

The first group contains information which, by its content, is not information of public importance (for example, private electronic mail correspondence of a public official from a business computer, or the list of dialed and received telephone calls of a private nature).

The second group refers to documents which, according to their contents, constitute information of public importance, but have been a priori exempt from the particular framework due to other reasons (so-called “exclusions”).

The third group includes documents which are not freely available and present exceptions from publicity according to the law. Exceptions to freely accessible information will be elaborated in more detail below.¹

The definition of “information” is also adequate with respect to its certain elements.

Ad. 1 The first part of the definition follows the logical rule that a public authority body must have the information in its possession. This is vitally important. However, it is irrelevant whether the information was *created* by another public authority body or whether the same information is held by two or more public authority bodies. From the standpoint of access to information of public importance, there is no difference between information of public importance held by various public authority bodies, as all information of public importance is of equal value, regardless of its source.

Ad. 2 At a minimum, information must be connected to the work of the public authority body. This means that the public authority body must have created the information of public importance in the course of its work, and within the procedures that are in its competence, according to general regulations. If this condition is fulfilled, then the information may refer to any content from any area of activity of the obligated subject, and may be connected to policy, activities and decisions which fall within the scope of responsibility of a certain public authority body.

The concept of “being connected to the work” cannot be equated solely with the narrow working area of a public authority body, but rather must be understood as

1 More on this in: Vse o dostopu do informacij javnega značaja, urednica, Nataša Pirc Musar, Založba Forum Media, Ljubljana, 2006.

any data created in connection with the execution of a public authority, i.e., in connection to the activity of the body. The concept of “being connected to the work” is, accordingly, significantly broader than “the field of work” of a given body, i.e., its subject matter jurisdiction. In that regard, the concept expands beyond the statutorily determined scope of work, commonly established by laws governing certain areas, to all information that is in any manner connected to such competencies.

Ad. 3 Information must also be contained in a certain document, which means that the information must take some tangible form. The law particularly emphasizes that neither the origin of the information, the form of the information (i.e., paper, tape, film, electronic medium, etc.), the date when the information was created, the method of learning about the information, nor other similar characteristics of the information is relevant to the inquiry. These criteria are in theory known as the “criterion of materialized form,” which means that the type of materialized form of information is not relevant.

International instruments also refer to this criterion. The most widely accepted definition of a document is contained in Regulation (EC) No.1049/2001 of the European Parliament and of the Council form 30 May 2001 regarding access to European Parliament, Council, and Commission documents. It defines a document as any content of any medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording), concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility. It is, thus, accepted that information may take visual, audio, electronic or any other material form. This is consistent with the Serbian FOIA.

Public authority bodies are not, according to FOIA, obliged to provide responses to applicants’ questions or to provide explanations in connection with the area of work of the public authority body. Since information must be in a tangible form, the concept of “information of public importance” may only include information, i.e., a document in which it is contained, that is in the possession of a public authority body at the time that an interested party requests access.

A public authority body is not, therefore, obligated to process, alter, or upgrade information in its possession through additional work to comply with FOIA. Information of public importance, to which the principle of free access applies, is simply the “raw” information. Access to this information does not provide for the right to request explanation of certain information, analysis, comment or opinion. If answers to questions are not included in a document which a public authority body holds, and if a public body would need to prepare answers separately through examining data and reaching conclusions, in order to provide responses to questions, this would constitute the creation of new information, which would not fall under the category of access to information of public importance.

Ad. 4 Finally, there is the condition of justified interest. The Serbian FOIA introduces the condition that information must refer to anything that the public *has a justified interest* to know.

This element of the definition of “information” is its weakest point, particularly when viewed from a comparative law perspective. The principle of free access is crucial for access to information of public importance. This means that information of public importance is freely accessible to all applicants, *erga omnes* and under equal conditions, regardless of whether a particular applicant has a justified interest for particular information.

The principle of free access at the same time also implies that each applicant has access to all information of all obligated subjects. The public’s reason for obtaining the requested information is irrelevant. Therefore, the determination of whether certain information is freely accessible is completely objective, as the personal interest of the applicant and the legal benefit of such an assessment are irrelevant. Contrary to this, from the literal interpretation of FOIA one could conclude that the existence of a justified interest is necessary for access to information.

Despite the conditional language of “a justified interest to know” discussed above, this element of the definition is understood well in practice. It is not being interpreted as an additional exception, or even a procedural precondition for access to information of public importance. Public authority bodies provide access to information according to the principle of free access, without requesting demonstration of a justified interest. This conditional language of “a justified interest to know” is interpreted to mean the provisions that regulate exceptions, as follows from the Guide to the Law on Free Access to Information of Public Importance.² For this reason, access is in practice only being restricted if any of the exceptions is given, and if the strict test of proportionality is performed. The assumption of the justified interest could be refuted only if an infringement of other rights is disproportionate to the right to access information (the public’s right to know).

Despite the above, the possibility exists that this element of the definition could cause difficulties in the future. For Article 4 of the Law, it can be argued that the justified interest in cases of peril or protection of health and environment is presumed, is probable, and is impossible to refute (*praesumptio iuris et de iure*).

In all other cases, justified interest is only a probability which may be refuted (*praesumptio iuris*) by a public authority body. In this respect, taking into consideration only the formulation of this provision, it can be concluded that the determination of the public authority body that the public does not have a justified interest to know is not connected to the existence of any of the exceptions established by law.

2 http://www.poverenik.org.yu/Dokumentacija/16_1dok.pdf

For this reason, the possibility exists that a public authority body could attempt to prove the absence of a justified interest in every case where an applicant does not state a justified interest. A literal interpretation of the definition of information could, therefore, create a practice which would be contrary to the principle of free access. A systematic interpretation within the law could lead to the conclusion that a public authority body might refuse access to information in cases where no legal exception has been stated by basing its position solely on the fact that the public has no justified interest to be acquainted with the information.

For this reason, the justified interest element in the definition of information of public importance is unnecessary and should be removed.

For comments by the Public Information Commissioner of the Republic of Serbia, please see page 13.

Exceptions to Freely Accessible Information

1. Types of Exceptions

Exceptions to freely accessible information are a category which marks, to a large extent, the normative framework and the implementation of the law on access in practice. Precisely formulated exceptions which do not allow for extensive interpretations are essential for the open functioning of a society. Interpretation of exceptions represents one of the most challenging tasks of obligated subjects and appellate bodies. The challenge is even greater as the exceptions are often not entirely defined in detail; instead, exceptions are generally defined or referenced by other laws.

There are two main categories of exceptions: absolute and relative. Absolute exceptions are significant because they lead to automatic refusal of access once their existence is established. For relative exceptions, a public authority body must consider whether information falls under an exception by conducting the public interest test or the harm test, whereby it determines if the public interest for publishing the document outweighs the interest for not publishing the document.

If the stated exceptions are absolute, it is only necessary to establish whether in each case any circumstance necessitating restriction of access to particular information has been stated. If such a circumstance (exception) has been stated, access is not allowed. In all other cases, the applicant should be provided with the information. Employing any test is unnecessary and impermissible for absolute exceptions.

For relative exceptions, it is, nevertheless, necessary to establish in each particular case whether any of the prescribed exceptions relating to access exist, and to assess whether there is a justified exception or whether the exception is outweighed by the right to access information of public importance.

In addition to classifying exceptions as absolute or relative, there is a further classification reflecting the protection of public and private interests. The protection of public interest includes the protection of national security, the defense of the state, the protection of public law and order, international relations, and various types of secret data. Private interests mean the protection of life or other important personal interests, such as a person's privacy.

It is equally important that the list of exceptions be as short as possible and that the exceptions be formulated by regulations that can be interpreted in practice as restrictively as possible. As with other exceptions, exceptions from freely accessible information must be interpreted as narrowly as possible. Thus, it is important for exceptions to be free of "loopholes" or simple references to a provision containing a given exception. Therefore, the public authority body must, in case of an exception, give a detailed explanation of circumstances justifying an exception. The analysis referring to the reasons for refusal of a request should be precise, and drafted in a concrete and clear manner so that the decision may be properly reviewed. A decision deficient in this sense could be revoked on appeal based upon the existence of a substantive violation of the rules of procedure as the decision could not accordingly be examined. The reasoning must be clear and set forth the facts considered during the balancing tests.

With respect to the harm test required by certain exceptions, the public authority body must determine the harm that would occur to a protected interest as concretely as possible. Simply stating the regulation that justifies an exception does not satisfy the required element of a presentation of facts. A decision cannot be reviewed if the public authority body does not explain in the reasoning of its decision the particular legal basis that justifies an exception. A reasoned decision ensures that the decision can be examined by an appellate body. Such review is not possible if the reasoning simply contains boilerplate language, is superficially written in order to satisfy the formal requirements, or makes no attempt to consider the unique facts of the particular matter.

Despite the relatively small number of exceptions listed in Article 9 of the Serbian FOIA, the law has certain deficiencies when examined in light of the aforementioned guidelines. All exceptions in Article 9 are stipulated too broadly, which could allow the obligated bodies to claim that the public does not have a justified interest to familiarize itself with the information. This broad as opposed to narrow formulation of the exceptions could allow and could even encourage an extensive interpre-

tation of exceptions. For this reason, appropriate amendments to Article 9 of the Serbian FOIA should be adopted.

For example, the exception in Article 9(1), which states that the right to access information of public importance is not allowed if it would expose to risk the life, health, safety or another vital interest of a person, is vague. Not only can the list of such “vital interests” be numerous, additions to the list can be frequently made.

The exception in Article 9(2), providing protection for all information connected to investigation, judicial and other proceedings regulated by law (including the execution of a judgment or a sanction), is more narrowly defined than the previously stated exception. With regard to the exception in Article 9(2), the fact that it applies to any proceeding regulated by law should be commended. Thus, the exception applies not only to various administrative proceedings, but also to other proceedings regulated by law, but used less often, such as the administrative procedure or the public procurement procedure.

The exception stipulated in Article 9(3), prohibiting access to information if it would “...seriously imperil national defense, national and public safety, or international relations” could also prove to be a ‘catch-all’ in practice, as almost any sensitive information coming from the high state administration would be connected to international relations, defense of the state, or national and public security. Thus, it would be easy to argue that access to information might jeopardize the items on this list.

This exception has even more traction when considered in connection to the exceptions set forth in Article 9(5), which refer to all types of secret data. The exceptions listed in Article 9(5) apply to state, official, business or other secrets which are, according to a regulation or an official document based on the law, accessible only to a specific group of persons. Assuming that this exception protects all types of secrets, the exception included in Article 9(3) becomes even broader, raising a question as to the purpose of this provision. Article 9(5) protects such a broad array of all types of secrets that any information related to state defense, national and public security and international relations is included.

However, since the law delineates certain types of secret data and interests from Article 9(3), it is necessary to distinguish information which has been given the status of a secret, according to regulation or an official document, and information which has not been granted such status but could, nonetheless, seriously jeopardize matters which may be protected as a state or other secret (defense of the state, national and public security, and international relations). Thus, even information which is not sensitive enough to be granted the status of a secret, as well as certain other information of lesser significance which has satisfied the stricter harm test, would be inaccessible.

Article 9(5) attempts, somewhat unsuccessfully, to include business secrets, which are typically considered the acts of third parties and persons outside the public sector and include the protection of competitive advantages of various subjects which conduct profit-making operations. This exception should be excluded from Article 9(5), as this section regulates only the protection of sensitive state-related information. The “business secrets exception” from Article 9(5) could, in practice, be covered by the exception listed in Article 9(4), which refers to the ability of the state to manage economic processes in the state and to the fulfillment of justified economic interests.

According to the current legislative framework, a number of laws regulate various types of secrets. This is contrary to the modern guidelines on regulation of secret data. Adoption of one law that would regulate all types of secret data in a unified manner is recommended. Such regulation would be a better solution both from the standpoint of transparency and from the standpoint of legal protection.

Regardless of the fact that the list of exceptions in the FOIA Law is exhaustive, the exceptions, taking into consideration their legislative character, are general and open to interpretation. Accordingly, the exceptions are more similar to constitutional provisions given that they have been formulated as general clauses. At the present, there are no references to separate laws that would regulate these exceptions in more detail.

For these reasons, the list of exceptions to freely accessible information should be formulated in a sufficiently specific manner so as to meet the criteria of legal safety and legal enforceability inherent to each legal state.

2. Harm Test

The essence of the harm test is an assessment of the harm which could occur from unrestricted access to particular information. The harm test assesses whether, judging from the standpoint of realistic consequences in a given case, and not just in the abstract, the publication of particular information would cause substantial harm, and whether that harm outweighs the public interest for disclosure of the information.

By using expressions such as “imperil,” “imperil, obstruct or impede,” “seriously imperil,” “substantially undermine,” and “seriously legally or otherwise prejudice...” FOIA clearly demonstrates the necessity of performing a relevant harm test when referring to all of these exceptions. With respect to the protection of life, health, safety or other vital interest of a person, as well as the protection of court proceedings, prosecution for a criminal offense, or enforcement of sanctions, stipulated by

Article 9(1) and (2), a less stringent harm test is required. It may be concluded then that the stated interests are better protected than the exceptions listed later in Article 9, as the emergence of serious or major harm is not required for these exceptions. Put simply, the exceptions listed in (1) and (2) are closer to absolute exceptions.

The exceptions to Article 9(3)–9(5) require a stricter harm test as the harm must seriously imperil the state defense, national or public security, or international relations. A stricter harm test is also required in Article 9(4), in case of a substantially undermined “ability of the state to manage national economic processes or significantly impede fulfillment of justified economic interests.”

The least strict harm test is required by the Article 9(5), which requires only the possibility of serious legal and other consequences to emerge. As it may be seen from the formulation of certain provisions, the legislature has already prescribed a particular type of harm for certain exceptions which constitute the only relevant reason for refusing a request. Hence, as the type of harm has been identified, it would not suffice for any type of harm to emerge due to the disclosure of the information. Instead, only the pre-determined types of harm may be considered:

- Article 9(1): Expose to risk the life, health, safety or another vital interest of a person;
- Article 9(2): Imperil, obstruct or impede the prevention or detection of criminal offense, indictment for criminal offense, pretrial proceedings, trial, execution of a sentence or enforcement of punishment, any other legal proceeding, or unbiased treatment and a fair trial;
- Article 9(3): Seriously imperil national defense, national and public safety or international relations;
- Article 9(4): Substantial undermining of the government’s ability to manage the national economic processes or significant impeding of the fulfillment of justified economic interest;
- Article 9(5): Possibility of serious legal and other consequences to interests that are protected by law.

The harm test represents a significant measure of precaution in relation to an abstract, even haphazard and automatic invoking of certain exceptions, as harmful consequences must be shown for each separate case. Thus, the law establishes a significantly broad use of the harm test as it is required for all exceptions stipulated by Article 9. At first glance, the harm test is well-regulated. There are still, however, some shortcomings that should be removed to avoid difficulties in practice. Thus, bearing in mind the breadth of the exception in Article 9(1), even the mere threat to various vital interests is listed among the numerous examples of disclosure of information concerning an individual person. Vital interests of a person that may be violated in such cases are dignity, privacy, and reputation.

Similarly, an exception to Article 9(2) is common in practice as it requires only the imperilment, obstruction or impediment to different types of legal proceedings, that is, to a just and fair trial. Due to the presumption of innocence, an impediment to a just and fair trial, as a rule, is present in all cases concerning information related to a suspect or an accused who has not been convicted by a final judgment.

The broadest harm test is the one contained in Article 9(5), which refers to various types of secret information. At first glance, this appears to be the most stringent harm test, because the law states that access may be refused only in cases of serious legal or other consequences for certain legally protected interests which outweigh the interest for access to the information. However, upon closer examination, this exception could be broadly invoked in practice, providing significant room for the requests to be refused.

According to the prescribed harm test, it is not necessary to explain that a particular harm has actually occurred; rather, only that there is a possibility of the emergence of serious legal or other consequences. Thus, in reality, a less stringent harm test is required here. In addition, the law does not require the emergence of the types of harm which have been determined in advance, but only the possibility of serious legal or other consequences for different interests protected by law. However, what seems to be debatable is that the law, apart from serious legal consequences, also considers the actual consequences for the interests protected by law as relevant. As the mere possibility of serious legal and other non-legal, i.e., actual, consequences are sufficient to refuse access, the significance of a need to balance the consequences that may occur for various legal interests vis-à-vis the interests of access to information may be diminished. The outcome of such balancing – where only the possibility of serious actual consequences for a certain legally protected interest is placed on the scale – would probably be negative, and could lead to almost automatic refusal of access to information.

3. Three-Prong Test

An additional method of balancing is inherent to the field of freedom of information in cases where two mutually competing human rights exist concurrently. In such a case, it is necessary to use the so-called “three-prong test” for the purpose of striking a balance between the competing human rights (i.e., reducing a public official’s right to privacy for the benefit of the right to information of public importance). In practice, the three-prong test, in accordance with international law, is used in such cases.

The three-prong test determines the existence or nonexistence of grounds for the restriction of access to information and consists of the following criteria: (1) each

restriction must be determined by a binding legal source, (2) each restriction must serve a lawful interest, and (3) each restriction must be necessary in a democratic society.

Certain parts of the test can often be found in other balancing approaches. The second and third prong of the test – the necessity of infringing a right and pursuit of a legal interest – reflect the principle of proportionality. The principle of proportionality represents a legal tool for restricting the state authorities' infringements of basic human rights and freedoms that represent the public interest in its widest sense. In practice, the principle of proportionality provides an answer to the question – to what degree and in what manner may we infringe upon a constitutional right of an individual for the purpose of protecting another constitutional right.

In theory, an exception is lawful if it fulfills three conditions: it must be appropriate (when considering possible different courses of action), necessary, and proportionate in a narrow sense of the word as it must reflect the correctly estimated relationship between the two rights. The principle of proportionality, however, is also used as a method of balancing. The principle of proportionality has similarly been interpreted in the practice of constitutional courts of continental Europe as: (1) the necessity of the infringement, (2) the appropriateness of the infringement for the purpose of achieving a desired constitutional goal, and (3) proportionality in balancing the importance of the infringement of a constitutional right against the importance of a constitutional goal, by which one wishes to protect other interests guaranteed by the constitution.

The FOIA Law regulates the majority of exceptions by provisions of Article 9 and the protection of privacy clause in Article 14. Invoking any of the exceptions triggers the three-prong test, set forth in Article 8, which provides that the rights contained in FOIA law may be exceptionally subjected to limitations prescribed by the law itself, if it is necessary in a democratic society for the purpose of preventing a serious violation of an overriding interest based on the constitution or the law.

The necessity of conducting a three-prong test follows from Paragraph 2 of Article 8, according to which no provision of the law may be interpreted in a manner that could lead to a revocation of a right conferred by FOIA, or its limitation to a greater degree than the one prescribed in Paragraph 1, i.e., which restricts the right to access to a degree higher than the one which is allowed for according to the three-prong, or proportionality test.

This formulation, taken as a whole, conforms with the existing standards under the European Convention on Human Rights (ECHR), which provides for the use of the three-prong test in the implementation of the law, and emphasizes a restrictive approach to exceptions.

Good knowledge of the three-prong test is necessary for an appropriate interpretation of the exceptions. The general impression is that most of the obligated bodies are familiar with the three-prong test to a degree. Of the surveyed participants, 18 of 26 indicated that they had at least “some knowledge” of the three-prong test. Fully one-half of the surveyed participants indicated that they understand the three-prong test either “well” or “very well”. Despite such knowledge, only 5 of 25 surveyed participants had ever employed a balancing test in their decisions to grant or refuse an applicant’s request.

4. Exception for Internal Documents, i.e., Working Papers

In the legislative framework of FOIA, as well as in practice, there is an absence of a significant group of exceptions, known in all legal systems in Europe as “room for thought.”³ This exception is present in all legal systems which regulate access to information of public importance. It is generally a relative exception that protects internal documents and working papers from disclosure which could seriously imperil the decision-making procedures in a given public authority body. The purpose of these exceptions is to ensure confidentiality of the day-to-day work of the administration.

For an internal document, protection from publicity also applies to any part of a document that has been drafted in connection with the internal work of a public authority body and whose disclosure could cause an obstruction of the work, i.e., activity of a public authority body.

The following are examples of documents that have been drafted in connection with the internal work most commonly stated in theory: all internal correspondence between state officials and officials within the governmental administration for the purpose of decision-making of the government (administration) or decisions of other relevant subjects; internal communication of public authority bodies, official letters, minutes, opinions, reports, instructions, and guidelines in particular; and other internal documents.

In some legal systems, sensitive internal guidelines and plans which set forth the manner of selection and execution of various types of supervision have been granted a status of such exceptions. However, it is important to note that these are exceptions. Thus, it is necessary, in order to assess its legitimacy, to conduct the harm test to determine whether the disclosure of information would cause disturbances in the performance of activities of a public authority body.

Comparatively speaking, the described exception is present in the majority of legal systems where “the internal process of deliberation of the public authority body” is

3 Work product or working papers.

guaranteed by law. Data which is used to formulate the policy of public authorities is reserved. Here, we refer to documents produced for internal use of public authorities from which the procedure, i.e., the manner of operation of a given public authority body, as well as its internal politics, may be viewed.

In legal theory, this is known as the “*deliberative process privilege*”. The purpose is the protection of the internal *deliberation* of public authorities in order to facilitate their open and sincere deliberations that could otherwise be obstructed if completely open to the public. At the same time, the aim of the exception is to prevent any harm to the quality of the decision-making process of public authorities which could occur. Reasonable protection of the process of “internal deliberation” of public authority bodies does not necessarily conflict with the principle of open administration. If all such documents were to be made public, it could seriously imperil the critical, innovative and efficient work of the public sector.

The situation is different with a working paper, i.e., an unfinished document. In this situation we refer to data contained in a document which is still being drafted, still subject to deliberations in the public authority body, and whose disclosure could cause a misinterpretation of its contents. For a determination that a document is a working paper, three elements must exist concurrently:

- The document must still be in the process of being drafted;
- The document must still be subject to deliberation;
- Application of the specific harm test (disclosure of the document could cause a misinterpretation of its contents).

Data contained in documents which could still be amended or supplemented is protected in this manner. This protection allows deliberations, discussions, as well as the process of finding various solutions to a given situation, to be carried out independently of outside influences. This exception refers both to documents drafted by a public authority body itself as well as those that have been received from third parties that refer to as-yet-unsolved problems.

Both exceptions are limited in time as they do not apply to the phase in which a solution is adopted, i.e., a document is signed or sent out. Since they present typical exceptions which are primarily significant to the operation of the state administration, from a *de lege ferenda* viewpoint, it is necessary to consider the possibility of their inclusion into the provision of Article 9. Attention should be drawn to the fact that, *de lege lata*, this exception is not included in Article 9(5), which refers to state, official, business, or other secrets. Internal documents or working papers which are drafted in the daily work of the administration have not been granted the status of secrets, which would be necessary for such documents to fall within this exception.

The need to protect secret data is far greater than the need to protect internal documents or working papers, as different types of secret information must not and cannot replace exceptions for internal documents or working papers. The exception stipulated for secret information should be used only in cases when it is strictly necessary.

The exception for secret information, comparatively speaking is ranked very highly among all exceptions. As this is an exception that provides for the highest level of protection, it is required that each secret information fulfills various formal and content-related conditions for the purpose of providing protection from potential abuses. In this manner, the abuse of this exception – i.e., protecting certain internal documents or working papers that do not need protection – would be avoided. Labeling a document “secret” regardless of its designation as a state, official, or any other kind of secret, must remain the ultimate step taken for the protection of documents.

It is also recommended, to prevent abuse, that the exception for internal documents or working papers be determined, not as an absolute, but rather as a relative exception, and that its invocation should be made subject to both the harm test and the public interest test.

Should such an exception be formulated as an absolute one, it would allow for a non-critical and disproportionate non-transparency of a part of the administration. For this reason, the application of different balancing tests to this exception is necessary. On the other hand, efficient and quality work of the administration would often not be possible if the administration did not have time and space to *think*, protected from outside influences.

5. Other Forms of Exceptions

5.1. Previously Published Information

Article 10 of the Law stipulates a special exception to freely accessible information. FOIA states that a relevant public authority body is not obligated to act if the requested information has already been published and made accessible in the country or on the Internet. In such a case, it is sufficient to notify an applicant where and when the information was published, except for cases where this is a well-known fact.

This exception is in full conformity with international standards that regulate an exception for previously-published information. The essence of access to information is, namely, to provide undisclosed information to be made public. The purpose of a system would be questioned if access to information that had already been made public was required to be provided anew.

Interpretation of this exception is unlikely to lead to abuse by first instance public authority bodies assuming they interpret the term “already published information” as solely referring to publicly accessible information (public records, information from an official gazette, publications of public authority bodies, media, professional literature, etc.) and if the whereabouts of the previously published information are provided in a sufficiently precise manner.

It is also undisputed that the Law allows for refusing access if the requested information has already been made public on the Internet. It is not relevant whether the information is easily accessible to a concrete applicant (i.e., whether an applicant has access to the Internet); only that the information is easily accessible to the general public.

Abuse of Free Access to Information of Public Importance

Abuse of free access to information of public importance is covered in Article 13 of the Law. Abuse of access is treated as a separate type of exception. When a public body determines the existence of abuse, it is not obligated to provide access to information.

One deficiency of such a provision may be that in such a case, no responsible person is explicitly obligated to refuse access to information in the form of a decision which could be challenged upon appeal or within an administrative procedure. It is important that a public authority body provides an applicant with a written response in which the grounds for the decision regarding abuse are explained or made public, and the decision may also be subject to external review.

*Comments by Nemanja Nenadic, Transparency Serbia
(Coalition for Free Access to Information of Public Importance):*

The obligation of a public authority body to issue a response in cases where a public authority body believes that an applicant is abusing his/her right is being questioned at this page. In my opinion, there is no doubt that such an obligation exists.

The Law does not define abuse, but provides examples of requests which are abusive, such as irrational requests, frequent requests which are repetitive with respect to the same or already obtained information, and requests for too much information.

The definition of abuse is, therefore, open to interpretation. For this reason, the formulation of the actual criteria for determining abuse will depend on the practice of the public authority bodies. A public authority body should not decide whether the applicant has abused the right to access information of public importance on the basis of hasty conclusions.

This criterion of an open interpretation of the definition of abuse follows international recommendations on the right to free access to information. Therefore, it is important that this exception is not overused, leading to the unjustified refusal of access based on alleged abuse whenever a request for access to information would, in any way, be unpleasant for them or would mean an overload in work. This is a significant task for appellate bodies, the commissioner and the courts, who will decide upon appeal, or in an administrative proceeding.

In deciding on a request, all public authority bodies should start from the position that restriction of access to information must be based upon specific findings, and that invoking this particular exception must be explicitly based, and applied only in cases where the right has undoubtedly been exercised contrary to the purpose of providing free access to public information.

Comparative Overview of the Methods of Regulating Exceptions

1. Freedom of Access to Information Act (Federation of Bosnia and Herzegovina)

The Freedom of Access to Information Act law enumerates exceptions upon which access to information may be refused, and explicitly emphasizes that each exception to disclosure is determined by obligated bodies on a case-by-case basis. The intent is for exceptions to be interpreted rather restrictively, and all must be subject to the public interest test.

Exceptions are divided into those referring to functions of public authorities, to confidential commercial information (of third parties and not of public authorities), and to the protection of personal privacy.⁴ The first two groups of exceptions include the harm test. A stricter harm test is required with respect to information that falls within the scope of work of public authorities, while a regular harm test is required for confidential business information.

⁴ Articles 6, 7, and 8 of the Act.

The manner in which exceptions have been regulated in this law may be considered the best solution when compared to solutions contained in laws that regulate access to information in Serbia, Croatia and Slovenia.

2. Law on the Right of Access to Information (Republic of Croatia)

The Croatian Law regulates exceptions to free access of information in a separate article (Article 8). Only various types of secrecy such as a state, military, official, professional, and business secret, as well as protected personal data, have been designated absolute exceptions. Relative exceptions are more numerous, and access is refused when disclosure would lead to the following circumstances:

- 1) make it impossible to take measures or carry out action to prevent and uncover criminal offenses or for the prosecution of perpetrators of criminal offenses;
- 2) make it impossible to effectively, independently or without prejudice conduct court, administrative or other legally established proceedings, to execute court decisions or penalties;
- 3) make the work of bodies that carry out administrative supervision, or supervision of legality impossible;
- 4) cause serious damage to life, health, safety of people or environment;
- 5) preclude implementation of commercial or monetary policy;
- 6) endanger intellectual property rights, except in cases of express written consent of the author or owner.

All exceptions are subject to the harm test, which would be performed only if requested by a subject who may suffer harm due to the publication of certain information.

These exceptions have been made even less stringent by a provision stating that information cannot remain protected longer than 20 years from the date of its creation, unless a longer period of time has been established by law or other regulation. It is also determined that exceptions will be valid as long as the reasons justifying restriction of access exist.

3. Access to Public Information Act (Republic of Slovenia)

The Access to Public Information Act (hereinafter: APIA) establishes when and under which conditions a public authority body may refuse an applicant's request to access information. This may be done only when one of the legally prescribed

exceptions, determined by Article 6, Paragraph 1 of APIA, exists. According to the principle of free access contained in Article 5 of APIA, applicants have free access to information of public importance. Each applicant is entitled to receive, upon his/her own request, the information of public importance from a public authority body by acquiring a document(s) for inspection, acquiring its transcript, a copy, or an electronic record of such information.

It is important that an applicant is not obligated to state his/her legal interest, i.e., the justified reason for access. Article 6, Paragraph 1 of APIA lists 11 exceptions based upon which a public authority body may reject an applicant's request for access to information. A public authority body would reject such a request should it relate to:

- 1) Information which, pursuant to the Act governing classified data, is defined as classified;
- 2) Information which is defined as a business secret in accordance with the Act governing companies;
- 3) Personal data the disclosure of which would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data;
- 4) Information the disclosure of which would constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the Act governing Government statistical activities;
- 5) Information the disclosure of which would constitute an infringement of the tax procedure confidentiality or of tax secrets in accordance with the Act governing tax procedure;
- 6) Information acquired or created for the purposes of criminal prosecution or in relation to criminal prosecution, or misdemeanors procedure, and the disclosure of which would prejudice the implementation of such procedure;
- 7) Information acquired or created for the purposes of administrative procedure, and the disclosure of which would prejudice the implementation of such procedure;
- 8) Information acquired or created for the purposes of civil, non-litigious civil procedure, or other court proceedings, and the disclosure of which would prejudice the implementation of such procedures;
- 9) Information from the document that is in the process of being drawn up and is still subject to consultation by the body, and the disclosure of which would lead to a misunderstanding of its contents;
- 10) Information on natural or cultural values which, in accordance with the Act governing the conservation of nature or cultural heritage, is not accessible to the public for the purpose of protection of (that) natural or cultural value;

- 11) Information from a document created in connection with internal operations or activities of bodies, and the disclosure of which would cause disturbances in operations or activities of the body.

A public authority body, therefore, must provide a foundation for each of these exceptions and must specifically state them, as exceptions must be interpreted narrowly and restrictively due to their explicit definition. Accordingly, it would not be sufficient for a public authority body to simply claim that a certain exception, used as a basis for refusing an applicant access to information, exists, as this would constitute an infringement of the basic principles of APIA – the principles of openness and transparency.

The harm test has been, nonetheless, established only with respect to exceptions stated in Sub-paragraphs 6, 7, 8, 9, and 11 of Paragraph 1. However, all exceptions have been made relative by the provision of Article 6, Paragraph 3, which states that without prejudice to the provision of the first paragraph, access to the requested information is allowed:

- if the considered is information related to the use of public funds or information related to the execution of public functions or the employment relationship of the civil servant, except in cases from point 1 and points 5–8 of the first paragraph and in cases when the Act governing public finance and the Act governing public procurement stipulate otherwise;
- if the considered is information related to environmental emissions, waste, dangerous substances in a factory or information contained in a safety report and also other information if the Environment Protection Act so stipulates.

The legislature has decreased the degree of the protection of privacy to everyone who, for whatever reason, uses public funds, in order to ensure the principles of transparency and supervision of the use of public funds. For this reason, the degree of the protection of privacy has been decreased in the field of expenditure of public funds with respect to anyone who wishes to use public funds. Information related to execution of a public function or employment of a public official has become exempt from protection (information on salaries, job positions, costs of business travel are most common examples of exceptions), as the legislature has significantly decreased the scope of privacy guaranteed to all persons working in the public sector.

A public interest test applies to all exceptions, with the exception of those that are listed in Article 6, Paragraph 2 of the Slovenian law (information which is in accordance with law; information which has been granted a status of a secret and is denoted with one of the two highest levels of secrecy; information which con-

tains or has been prepared based on classified information of a foreign country or international organization with which the Republic Slovenia has concluded an international agreement in connection with exchange or transmitting of classified information; information which contains tax data or has been prepared based upon tax procedures which have been transmitted to Slovenian public authority bodies by a public authority body of another state; information from statistical report units⁵). A more detailed explanation of this test will follow in a separate chapter.

5 During the course of drafting this analysis, legislative changes have occurred according to which tax secrets have been made subject to the public interest test.

Procedure Envisaged by the Law on Free Access to Information of Public Importance

Section 3 of the Assessment is a full discussion of the procedural rules required by the Serbian FOIA. Section 3 also includes the results of a survey of state institutions to determine their knowledge of and compliance with the Serbian FOIA. Finally, Section 3 considers the relationship between the procedures set forth in the Serbian FOIA and other Serbian procedural laws.

Regulation of the procedure of access to information of public importance in the Serbian FOIA follows basic trends in modern democratic legal systems. Accordingly, the four most important pre-conditions of the request procedure have been incorporated into the Serbian FOIA:

- 1) The rule that in case of dispute, the burden of proof is on the party claiming that the disclosure of information is prohibited – usually a concerned public authority body. This means that when the necessity for the protection of certain information has not been proven beyond doubt, a request for access must be granted (the principle *in dubio pro reo*). This rule derives from the principle of free access, whereby an individual should have access to all information of public importance not covered by one of the statutory exceptions (the principle of free access is set out in Article 4 of the Serbian FOIA).
- 2) The obligation of public authorities to consider every request in accordance with the prescribed procedure and to provide an appropriate response to the request.
- 3) An applicant is not required to explicitly state that the request is a request to access information of public importance. This means that if it may be seen from the character of the request that it relates to access to information of public importance, the public authority body must consider a request according to the Serbian FOIA.
- 4) An applicant need not state legal grounds for the request. This is the most important condition of the procedure for access to information of public importance initiated by a request of an applicant. The given presumption means, practically speaking, that an applicant does not need to specify a legal ground for the request, nor is he/she obligated to prove any legal interest.

The fact that the provisions of the Law on General Administrative Procedure¹ (hereinafter: LGAP) are applicable as subsidiary rules should also be added to the four

basic pre-conditions stated above. Provisions of LGAP are applicable to procedures before both first instance (Article 21 of the Serbian FOIA) and second instance bodies (Article 23 of the Serbian FOIA), which is consistent with procedures followed in modern democratic systems.

1. Procedure before a First Instance Body

A request for access to information of public importance should, in general, be submitted in writing. The Serbian FOIA, similar to laws of most modern legal systems which encourage informality and a greater use of all means available, also allows for a request to be submitted orally. Article 15, Paragraph 7 of the Serbian FOIA states that a public authority body is required to grant access to information based upon an oral request on the record by an applicant. An oral request shall be recorded. All deadlines applicable to requests filed in a written form equally apply to oral requests.

Article 15, Paragraph 7 should be commended, as it does not require a special procedure that is different and less formal from a procedure based upon a written request. Thus, oral and written requests are treated equally. Accordingly, a public authority body must decide upon an oral request for access to information of public importance within deadlines stipulated by Article 16 of the Serbian FOIA. Additionally, an oral applicant is entitled to initiate an administrative complaint against a public authority body as set forth in Article 22 of the Serbian FOIA.

With respect to Article 15 of the Serbian FOIA, particular attention should be given to paragraphs 4 and 8 of this article. Paragraph 4 expressly states that an applicant is not required to list reasons for a request. The Serbian FOIA therefore satisfies the most important procedural pre-condition of access to information of public importance – that an applicant need not legally substantiate his/her request. Paragraph 8 provides that a public authority must also review requests that have not been lodged in a form prescribed by a public authority, should such a form exist. The Serbian FOIA has therefore satisfied the above-referenced fundamental procedural pre-condition number three.

The time frame in which the public authority must inform the applicant whether it has the requested information in its possession, allow inspection of the document containing the requested information, or issue a copy of the document to the applicant, is 15 or 40 days (the latter date referring to situations where a public authority is, for a justified reason, unable to fulfill his obligation within 15 days) from the date a request was received (Article 16, Paragraphs 1 and 3).

This deadline is comparable to deadlines set forth in FOIA provisions of developed legal systems. It is important to note, however, that the extension of the deadline on the ground of justified reasons (up to 40 days from the receipt of request) is not thoroughly regulated, as the Law does not require a public authority body to adopt a separate conclusion to justify the deadline extension, but only requires it to inform an applicant of the decision and to set a new deadline.

A better approach would be for the Law to require a public authority body to adopt, within a specified time, a separate conclusion justifying and specifying the reasons for the deadline extension. Such a deadline should be relatively short and not longer than the 15 day normal deadline for transmission of information of public importance under the Serbian FOIA.

Article 16, Paragraph 2 of the Serbian FOIA should particularly be commended. This article regulates situations where a request relates to information presumed to be relevant for the protection of a person's life or freedom, i.e., the protection of public health and environment, and obligates the public authority body to inform an applicant whether it has such information in its possession, to allow inspection of the document containing the requested information, or to issue a copy of the document to the applicant within 48 hours from receipt of the request. A particularly short deadline for transmission of such information is warranted due to the importance of such information.

Regarding deadlines, attention should be given to the somewhat vague language of the Law. The Law stipulates only the deadlines in which a first instance body must inform the applicant whether it is in possession of information, allow an inspection of the document containing the requested information, or issue a copy of the document to the applicant.

On the other hand, in Article 16, Paragraph 10 of the Law, which regulates the conduct of a public authority body in cases where it fully or partially rejects a request, the deadlines have not been stated. A conclusion that may be drawn from a systematic interpretation of the Law is that a first instance body is required, even in cases where it is fully or partially rejecting a request, to decide within the deadlines set forth in Paragraphs 1, 2 and 3 of Article 16 of the Serbian FOIA. The Law, however, would be stronger if this uncertainty was removed by codifying the deadlines for first instance bodies to *decide* upon requests. The term "decide" refers to both a positive (transmission of information) and a negative (refusal of a request by a decision) decision of a public authority body with respect to a request, and eliminates any vagueness as to the time frame in which a public authority body must make a decision to refuse a request.

*Comments by Dejan Milenković, YUCOM
(Coalition for Free Access to Information of Public Importance):*

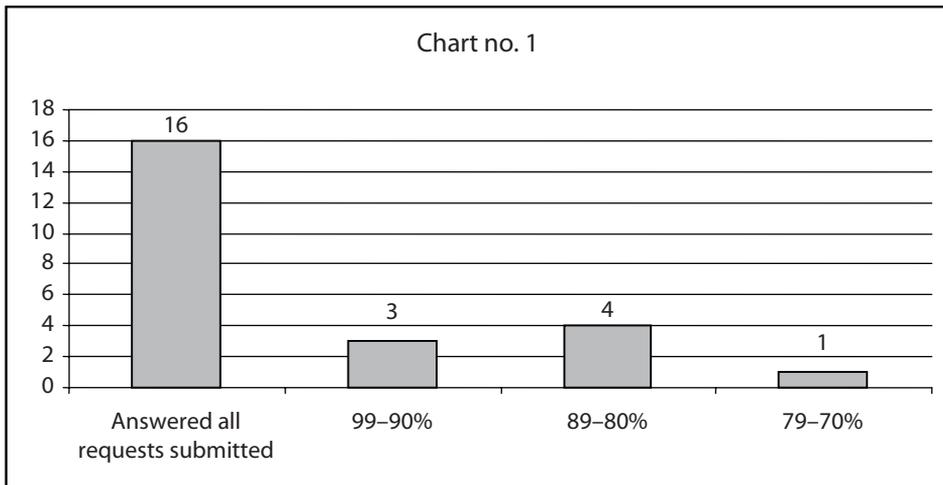
Mr. Klemenc has stated: “The term ‘decide’ refers to both a positive (transmission of information), and a negative (refusal of a request by a decision) decision of a public authority body with respect to a request, and eliminates any vagueness as to the time frame in which a public authority body must make a decision to refuse a request.”

In the Model Law (2003), prior to it becoming an official Proposal, the Coalition had insisted that the term “decide” should be substituted with the term “act”. Even then, we tried to emphasize the fact that access to information is a *human right* which, given its character, belongs to citizens (as well as legal entities). Accordingly, a public authority body **does not decide upon one’s right** (since that right, by its character, already belongs to citizens) **but only acts upon a request**, which means that **not all cases** where a public authority grants access to information warrant *the issuing of a decision (an administrative act), an authoritative act of those vested with authority to unilaterally decide on rights, duties and legal interests of individuals in a given administrative matter*. A specific *administrative action of informing an applicant about the decision* may be performed instead, which is consistent with the contemporary concept of human rights. Therefore, free access to information *is a human right*, and *not an administrative matter*. As a result, the only exception when a **public authority determines one’s right** is the case when a public authority body would deny access to information for the reasons stipulated by law and following the conduct of the harm test. Only in such a case would a public authority body issue, in accordance with the law, *a reasoned decision denying access*, which enables the use of other procedural tools, such as the filing of a complaint with the Commissioner or initiating an administrative dispute.

In my opinion, the stated procedural characteristics are of crucial importance for future reform of the *system of general administrative procedure* in Serbia, as human rights cannot be treated or seen as an administrative matter, as the current legal scheme of the general administrative procedure allows. In my personal view, these provisions of the Law on Free Access to Information of Public Importance highlight its *quality* and not its shortcomings.

Results of the survey conducted in the state institutions of the Republic of Serbia suggest that the public authorities are well-informed of the deadlines stipulated by Article 16 of the Serbian FOIA. Out of 26 interviewees, 24 provided a correct answer when asked about the deadlines set for providing the requested information to the applicants. When asked about situations in which the deadline for providing the requested information to the applicant could be extended, 21 of 26 interviewees provided accurate responses. The survey also indicated that the majority of public authorities stated that they respect statutory deadlines – two-thirds of the sample surveyed (16 out of 24 public authority bodies who provided an answer to this question) stated that they gave timely responses to *all* requests made by applicants,

while the remaining one third stated that they provided timely responses to more than 70% of requests (Chart no. 1).



Article 16, Paragraph 8 of the Serbian FOIA, which explicitly allows applicants who are unable to inspect a document containing the requested information to inspect the document with the assistance of an escort, should be particularly commended. This provision is particularly important in cases where an applicant is blind or has poor vision.

However, FOIA's regulation of the manner in which an applicant can receive the contents of the requested information has its shortcomings. Unlike the majority of modern systems, the Serbian FOIA does not allow an applicant to individually select the manner (form) of viewing or receiving the information of public importance.

Article 18, Paragraph 2 of the Serbian FOIA stipulates that a public authority will issue a copy of a document (photocopy, audio copy, video copy, digital copy, etc.) containing the requested information in the form in which the information exists. It follows from this provision that the word "copy", according to the Serbian FOIA, means only a copy in the same form as that in which the information is actually held by the public authority.

For example, an applicant cannot, according to the Serbian FOIA, request a transcript of the requested information or an electronic version of the hard copy (should the information be kept only in hard copy), and vice-versa. Other provisions of the Serbian FOIA do not rectify this shortcoming. For example, Article 15 of the Serbian FOIA, which prescribes the contents of a request for access to information, does not stipulate that an applicant shall or even can choose the form of viewing or receiving the information. Even Article 5, which determines the right to access

information of public importance, addresses only the right to inspect a document containing the information of public importance, the right to obtain a copy of that document, and the right to receive a copy of the document, upon a request, by mail, facsimile, electronic mail or in another fashion. Thus, it is evident from a number of Serbian FOIA provisions that an applicant can only choose between inspecting the document and receiving a copy of the document containing the requested information. This does not satisfy the criteria of modern legal provisions regulating access to information of public importance.

The deficiency of the legislative framework in this area has been somewhat compensated for by the list of expenditures envisaged in the Government's Decree on the amount of necessary costs charged for issuing copies of documents containing information of public importance. The list of expenditures, among other things, includes a fee to be charged for converting one page of a hard copy document into an electronic form. Thus, it could be concluded that the form in which a public authority would transmit the requested information would depend on the choice of the applicant.

Nonetheless, this legislative deficiency should be amended, as the right of an applicant to choose the form in which he/she wishes to receive the information is one of the essential elements of the right to free access to information of public importance, and this defect cannot be resolved by supplementary legislation. The shortcoming could be easily removed by introducing a provision which would explicitly state that the applicant is entitled to choose the manner (form) of viewing or receiving the requested information.

The same goal could also be achieved by amending some of the existing provisions, for example Article 15, Paragraph 2, to require that the applicant's request contain information regarding the manner in which he desires to view or receive the contents of the requested information.

Article 18, Paragraph 4 – which stipulates that if the public authority is in possession of a document containing the requested information in a language in which the request was submitted, it is obliged to enable the applicant to inspect and make a copy of the document in the language in which the request was submitted – should also be commended. This provision acknowledges that public authorities may be in possession of documents written in several different languages. Moreover, it obligates public authorities to make the requested information available to the applicant in the language in which the request was submitted if they possess the requested information in the given language. From the viewpoint of equality, this represents a worthy solution. A public authority's failure to act in accordance with Article 18, Paragraph 4, constitutes a basis for a complaint under Article 22, Paragraph 1, Sub-paragraph 5.

At this point, attention should also be drawn to the fact that the Serbian FOIA does not explicitly regulate cases where an applicant determines that the information provided by a public authority body is not the information requested in the application. In some jurisdictions (i.e., Slovenia), an applicant is able to request a viewing or receipt of the information stated in the request (even before filing a complaint). In such a case, the authority must decide upon this request within an additional, though relatively short, period of time. Having such a provision is recommended as it provides an applicant with an additional method of requesting information. At the same time, it provides for a swift and efficient way of correcting a possible error made by a public authority body or a misunderstanding between an applicant and a public authority body, without unnecessarily engaging the appellate body and consequentially delaying access.

For the Serbian FOIA, a similar provision would be even more beneficial given that this situation is not addressed by Article 22, Paragraph 1, which regulates in detail situations where an applicant is entitled to a complaint.

*Comments by Nemanja Nenadic, Transparency Serbia
(Coalition for Free Access to Information of Public Importance):*

The author erroneously concludes that providing incorrect information is not a basis for a complaint. This situation has been addressed in Article 16, Paragraph 1 which states “[A] public authority shall without delay, and within 15 days from receipt of the request at the latest, inform the applicant whether it holds the requested information, allow insight in the document containing the requested information, i.e., issue or send out to the applicant a copy of the document.” In each of the cases listed, the Law is referring exactly to the information requested by the applicant. Accordingly, the public authority body would not be relieved of its obligation to provide access to the information requested by providing access to some other information.

The Serbian FOIA, likewise, does not specifically regulate access to information of public importance that is original work and subject to copyright law. Situations may arise where an applicant requests a document which fulfills all the requirements of FOIA and is, at the same time, an original work. The fact that a document is an original work cannot be a reason for rejecting a request to inspect a given document, since a copyright is not an exception to free access. This being said, such documents still enjoy a higher degree of protection in terms of their duplication. The majority of contemporary legal systems, accordingly, state that in such cases an applicant can only inspect the information protected by copyright law.

Articles 19 and 20 of the Serbian FOIA regulate conduct of first instance bodies and the Commissioner for access to information of public importance (hereinafter: the

Commissioner) in cases where a public authority body to whom an applicant has submitted a request does not possess the requested information.

Article 19 stipulates that if a public authority body does not possess a document containing the requested information, it will transmit the request to the Commissioner and will notify both the Commissioner and the applicant as to whom, in its knowledge, does possess such a document. Article 20, Paragraph 1 stipulates that upon the receipt of the request, the Commissioner shall check whether the document containing the requested information is held by the public authority body which has transmitted the request. In the event that the Commissioner determines that the document is not in the possession of the public authority body that has referred the request, the Commissioner will either forward the request to the public authority body that holds the document, unless the applicant specifies otherwise, and will inform the applicant thereof, or the Commissioner will refer the applicant to the public authority body that holds the requested information (Article 20, Paragraph 2). The Commissioner will select the manner of acting from the options given in Paragraph 2, depending on the more efficient manner of accomplishing the right to access information of public importance (Paragraph 3). If the Commissioner transmits the request to a public authority body noted in Paragraph 2 of this Article, the time period prescribed by Article 16 shall begin running from the day that the request was received (Paragraph 4).

The rule that the first instance body is obligated to transmit a request to the Commissioner in cases where it does not possess a document containing the requested information does not appear to be the best solution. If the first instance body cannot determine from the contents of the request which other body would be competent to deal with the request, it would be unrealistic to expect the Commissioner to determine this more easily.

From the formulation of Article 19 of the Serbian FOIA however, it appears that the first instance body is required to transmit the request to the Commissioner only if it knows, based on the contents of the request, which body is competent to deal with it. In this situation, there is no reason why the first instance body would not transfer the request directly to the competent body and would not inform the applicant (and possibly the Commissioner) thereof. Such conduct is consistent with Article 56, Paragraph 4 of the LGAP, which stipulates that when a public authority body receives a request by mail that is outside of its competence, and when there is no doubt as to the body competent to handle the request, the request shall be transmitted without further delay to the competent body and the applicant will be informed about such action.

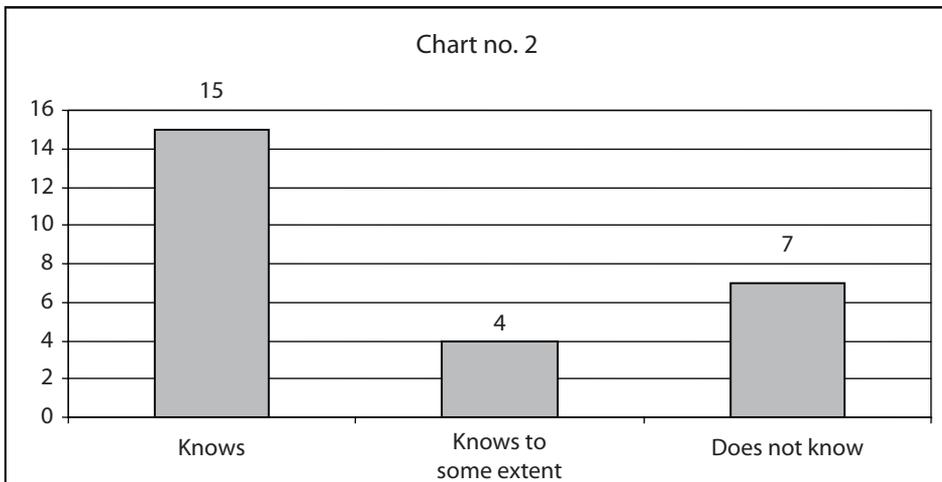
A public authority body could act accordingly on the basis of Article 21 of the Serbian FOIA which stipulates that the LGAP shall be applied to the procedure of access to information of public importance.

The obligations of the Commissioner under Article 20 of the Serbian FOIA represent an unnecessary duplication of work and a procedural delay. Furthermore, the Commissioner's obligations are unclear if he/she is unable to determine the body in possession of the requested information. Furthermore, the Serbian FOIA Article 16 deadline is equally unclear in cases where the Commissioner determines that the document containing the requested information is in fact in the possession of the first instance body that initially transmitted the request to him/her.

The question arises whether, in practice, it is realistic to expect that the Commissioner will always be able to act in accordance with Article 20 of the Serbian FOIA and meet the obligation to check whether the document containing the requested information is in the possession of the public authority body that transmitted the request. With an increase in FOIA requests expected in the future, it is easy to imagine that the Commissioner would spend all of his time investigating the location of requested documents as required by Article 20, Paragraph 1.

Nonetheless, the rationale of Articles 19 and 20, namely that the Commissioner as the second instance body should supervise the process and prevent applicants from being sent "door to door," is strong. We do, however, believe that the current statutory solution could be characterized as a waste of resources and insufficiently specific, and should therefore be amended to exclude the obligation of first instance bodies to refer requests to the Commissioner.

The survey of public authority bodies of the Republic of Serbia shows that the majority of public authority bodies are aware of their obligation to transmit an applicant's request to the Commissioner in cases where they do not possess the requested information but know which body does possess such information. When asked about their duty in such a case, more than half of the interviewees (15 out of 26) gave the correct answer (Chart no. 2).



In the chapter concerning the procedure before a first instance body, the Serbian FOIA also contains a provision on the fees for providing information of public importance (Article 17). Article 17, however, is limited only to the general principles of reimbursement of costs for access to information, while the detailed regulation of the matter has been left to the Government's "List of Expenditures."²

The starting point is the principle that inspection of requested information is free of charge, while only the reimbursement of the necessary costs of making and sending a copy of the document is allowed. Both principles conform to the modern trend in democratic systems. Attention should, however, be given to slightly unclear language regarding the reimbursement of the necessary costs for making and sending a copy of a document. Article 17, Paragraph 2 thus stipulates that the applicant is obligated to pay reimbursement charges for duplication and delivery upon the issuing of the document. It follows from the literal interpretation of this provision that the public authority body is obligated to charge for the duplication and sending of a copy of the document. Such a conclusion also follows from the list of expenditures contained in the Government's Decree on the amount of necessary costs charged for issuing copies of documents containing information of public importance.

The list of expenditures provides that a public authority body may decide to waive the reimbursement of necessary costs if they do not exceed 50 dinars and, particularly, in cases of smaller documents transmitted by mail or facsimile. Therefore, it can be concluded that a public authority body has discretion whether to request the reimbursement of the costs only if the necessary costs do not exceed 50 dinars, while for amounts exceeding 50 dinars, this discretion does not exist, and reimbursement of costs must be requested in each case. Despite the fact that the results of the survey conducted among the public authority bodies of the Republic of Serbia show that the majority of public authorities do not charge necessary costs (22 out of 26 interviewees have stated that they do not request the reimbursement of the costs), it is recommended that the Law be amended to stipulate that the public authority body *could* make a request for the reimbursement of necessary costs.

Thus, the public authority bodies could waive the reimbursement of costs even in cases where the costs exceed the amount prescribed in the List of Expenditures. Mandatory reimbursement of necessary costs for duplication or delivery of copies could dissuade applicants from exercising their right to access information of public importance, which would undoubtedly be contrary to the spirit of FOIA.

Article 17, Paragraph 4 of the Serbian FOIA exempts the following categories of applicants from the obligation to reimburse necessary costs for duplication or sending

2 Included in the Government's Decree on the amount of necessary costs charged for issuing copies of documents containing information of public importance.

of copies: journalists, when they are requesting a copy for professional reasons; human rights organizations, when they are requesting a copy in performance of their registered activities; and any other person, when the requested information relates to the protection of public health and environment, except in cases referred to in Article 10, Paragraph 1³ of the Law.

In principle, we do not see any reasons for journalists and human rights organizations, as opposed to other applicants, to be exempt from reimbursement of costs for transmission of information of public importance. Nevertheless, inclusion of such a provision is welcome, particularly in transitional countries with a short history of democratic tradition. Journalists and human rights organizations are usually best informed about the right to free access to information of public importance and are among the most frequent users of FOIA. In countries where the right to free access to information of public importance is yet to be fully accepted, this payment exemption could help to promote FOIA, both among state institutions and the public. Additionally, any provision facilitating access to information of public importance (particularly in transitional countries) through the use of so-called positive discrimination should be praised.

The provision of Article 17, Paragraph 5, whereby the Commissioner monitors the practice of public authorities in reimbursing the costs for providing information of public importance and granting waivers with respect to such reimbursements, and issues recommendations to public authorities in order to standardize their practice, is useful. As the body exclusively dealing with issues relating to access to information of public importance, the Commissioner is most familiar with the practice of calculating reimbursements, given that the public authority bodies are obliged to state in their annual report the total sum of costs charged for providing information of public importance (Article 43, Point 3 of the Serbian FOIA).

The public authority bodies calculate costs directly from the List of Expenditures prescribed by the Government for this purpose, and not according to their own internal lists of expenditures which they adopt according to the Government's List of Expenditures (as is the practice in the Republic of Slovenia, for example). This solution is favorable from the perspective of transparency and harmonization of practice, as the costs are public knowledge for all FOIA applicants due to the Government's Decree containing the List of Expenditures. On the other hand, this prevents public authority bodies from charging costs lower than those prescribed by the aforementioned List of Expenditures. (This is even more justified since public authorities are obliged to request reimbursement of costs according to the Law).

3 Article 10, Paragraph 1 regulates the right of access to information which has already been published and made accessible in the country or on the Internet, n.b.

In this respect, amending the Law whereby the Government would only stipulate the highest costs that could be charged for providing information of public importance, while allowing public authorities to calculate their own price lists, would be worth considering. Such an amendment, together with allowing public authority bodies discretion in these matters, would provide a more liberal regulatory framework for calculating costs for providing information of public importance, and allow greater transparency of the public sector.

Finally, the survey indicates that state bodies refuse only a small number of requests. The sampling shows that 9 of 11 participants granted at least 80% of the requests they received.

2. Procedure before the Commissioner

The Commissioner's main and most important task is deciding upon complaints of applicants seeking access to information of public importance. An applicant's right to an appeal is regulated by Article 22 of the Serbian FOIA. The deadline for submission of the complaint is 15 days from when the decision was received. Article 22, Paragraph 1 of FOIA enumerates those situations when an applicant can lodge a complaint.

The Law here is somewhat inconsistent, as it regulates both the right to an appeal in cases where the public authority failed to make a decision within the prescribed period of time and the right to an appeal in cases of "silence of the administration" (failure to make a decision). The Law does not specifically state in any provision that silence of the administration is to be considered a rejection of the request. This specificity, however, is not necessary since this presumption is stipulated by Article 208, Paragraph 2 of the LGAP, which also applies in proceedings before the Commissioner pursuant to FOIA Article 23.

Examples of situations when an applicant may lodge a complaint are consistently enumerated in the Law. For example, it is possible to file a complaint if the public authority body conditions issuing a copy of a requested document upon payment of costs exceeding necessary costs (Article 22, Paragraph 1, Sub-paragraph 3). A complaint may also be lodged when the public authority body does not take into consideration Article 18, Paragraph 4, whereby it is obliged to allow the inspection of the document and to provide a copy in the language in which the request has been lodged, if it has in its possession the document containing the requested information in the language in which the request was submitted (Article 22, Paragraph 1, Sub-paragraph 5).

It should again be noted here that FOIA does not regulate cases where the applicant believes that the information provided by the public authority body is not the information of public importance that he/she had requested. In such a case, the public authority body would not issue a decision, nor would such a case be considered as “silence of the administration,” since the public authority did provide the applicant with information.

Considering that the Serbian FOIA includes a detailed enumeration of reasons for filing a complaint, a literal and logical interpretation of the text (*argumentum a contrario*) could lead to the conclusion that an applicant would not be entitled to a complaint in such cases. In order to avoid a legal void which could pose great difficulties to applicants, we recommend the regulation of such situations, either by allowing an applicant to submit an additional request to the first instance body or by listing this as a reason for filing a complaint. This legal void could potentially be filled within the existing legal framework by a broad interpretation of Article 25 of the Law (discussed in detail below), even though the purpose of this provision is undoubtedly different.

Article 22, Paragraph 2 of FOIA stipulates that a complaint cannot be brought against the decision of the National Assembly, the President of the Republic, the Government of the Republic of Serbia, the Supreme Court of Serbia, the Constitutional Court, and the Republic Public Prosecutor. An applicant can, however, initiate an administrative dispute against the decisions of the aforementioned bodies. The court would notify the Commissioner of the initiated proceedings *ex officio* (Article 22, Paragraph 3).

Irrespective of the fact that the bodies in question represent the highest state institutions, we do not see any reason why their conduct with respect to FOIA could not be subject to expert assessment of the Commissioner, who exclusively deals with issues regarding access to information of public importance and is most qualified to address these matters. Consequently, Article 22, Paragraph 2 of the Law unnecessarily reduces the power of the Commissioner as an independent and autonomous body, which could have practical consequences. It would be left to the courts – bodies traditionally less inclined to reveal information, particularly in transition countries – to decide on the request of an individual within an administrative dispute. As a result, this provision allows for reduced transparency of the work of public authority bodies whose decisions (or lack thereof) cannot be challenged through administrative procedure before the Commissioner. The conclusion is even more valid when considering that Article 25 of FOIA prevents the Commissioner from issuing a decision relating to the conduct of the stated bodies.

Among the provisions regulating the complaint procedure before the Commissioner, Article 24, Paragraph 3, which stipulates that the public authority bears the bur-

den of proving that it has acted within its obligations according to the Law, should be highlighted. This provision sets forth the procedure whereby in a case of a dispute, the burden of proof is with the party that refuses to provide the information of public importance. As previously explained, this rule can also be inferred from Article 4.

Article 25 of FOIA should be particularly commended as it stipulates that the Commissioner can, upon a report or *ex officio*, issue a decision stating that the public authority body, with the exception of bodies covered by Article 22, Paragraph 2, has not fulfilled its obligations stipulated by the Law, and can order the respective public authority body to take certain measures in order to fulfill such obligations, after providing the public authority body with an opportunity to give an explanation in writing (Article 25, Paragraph 1).

The report set forth in Paragraph 1 cannot be submitted in situations where the Law allows the filing of a complaint (Article 25, Paragraph 2). From the title of Article 25, which reads “Commissioner’s Decisions on Measures to Promote Transparency of Work,” it may be concluded that the Commissioner primarily decides on the duties of public authority bodies set forth in Chapter VI of the Law titled “Measures for Improving the Transparency of Work of Public Authorities.” This also follows from the Guide published pursuant to Article 37 of the Serbian FOIA.

The Guide states that everyone has the right to submit a report to the Commissioner claiming that a public authority body is not fulfilling its statutory obligations, particularly: its obligation to create and publish a directory containing the main data about its work (Article 39), its obligation to maintain an information medium that would enable an un-hindered exercise of the right to access information of public importance (Article 41), and its obligation to train its employees on their obligations regarding the rights regulated by Law (Article 42).

However, in our opinion, the language of Article 25 enables similar decisions also to be made in other cases. The only limitation is set forth in Article 25, Paragraph 2, whereby the report mentioned in Paragraph 1 cannot be submitted in situations where the Serbian FOIA stipulates the rules for filing a complaint. Therefore, this provision, which enables the Commissioner to efficiently supervise the implementation of FOIA provisions and to accordingly work towards improving the transparency of work of public authority bodies even beyond the scope of the procedure according to a request for access to specific information of public importance, is in our opinion very useful.

Furthermore, the fact that the provision of Article 25 enables not only the Commissioner but everyone to monitor the implementation of FOIA, as anyone can contribute to the improvement of the transparency of work of public authorities by

filing a report to the Commissioner, should especially be commended. Even in the absence of the stated provision, anyone would still be able to inform the Commissioner about a violation of FOIA provisions.

The advantage of Article 25 is, however, in the fact that it enables the Commissioner to issue a binding and enforceable decision upon such a report. Unfortunately, this tool cannot be used with respect to public authority bodies listed in Article 22, Paragraph 2 of the Law. Due to the fact that a complaint in case of a decision or “silence of the administration” is not allowed, this may contribute to the perception that the work of these bodies lacks transparency.

Article 26, Paragraph 2 is important with respect to the determination of facts by the Commissioner as stipulated in Paragraph 1 of the Article 26.⁴ This article states that the Commissioner may inspect any information medium to which FOIA is applicable. This is a strong provision as it enables the Commissioner to familiarize himself with every document, regardless of its contents, to facilitate his decision-making process.

Despite this, it should be noted that the Serbian FOIA is deficient with regard to regulating the competencies of the Commissioner to decide on access to information of public importance. FOIA lacks certain provisions that, due to the specific nature of access to information of public importance, are necessary for the appropriate conduct of the procedure for access to information of public importance.

It is often the case that the Commissioner will doubt the veracity of a public authority’s refusal to a request for access to information of public importance on the grounds that it does not possess the document containing the requested information. For the purpose of an efficient determination of facts, it is important that the Commissioner can make unannounced visits to the public authority bodies, can review documents in the possession of the bodies, and can question responsible persons. The open issue, then, is the amount of power of inspectors to investigate these matters.

A broad interpretation of Article 26, Paragraph 1 of the Law, stipulating that the Commissioner shall undertake actions to determine the facts necessary for reaching the decision referred to in Articles 24 and 25 could provide a legal basis for such authority of the Commissioner. We believe, however, that due to the unclear authority of Article 26, a better solution would be to amend Article 26 to make it more specific.

The practice of many countries (particularly transitional ones) has shown that the level of cooperation between the first instance and second instance bodies is not as

4 If it is necessary for the purpose of making a decision pursuant to Articles 24 and 25 of the Serbian FOIA, n.b.

high during the appellate procedure relating to access to information of public importance as it is in the typical two-instance administrative procedure where aligning interests facilitate cooperation.

The reason for this lack of cooperation is that the Commissioner is in the position of a body that must decide upon two conflicting interests (the interest of the applicant, i.e., the public, weighed against the interests of the first instance body) which makes the Commissioner an atypical second instance body. For these reasons, amending the law to include investigatory power to the procedure of access to information of public importance could be valuable to the Commissioner's role as the second instance body to determine the truth. Article 8 of the LGAP states that all facts and circumstances that are of importance for reaching a lawful and just decision should be fully and correctly determined.

For the same reasons, we recommend that the law regulating access to information of public importance explicitly stipulates that a first instance body must provide the Commissioner, upon his request, with all documents requested by the applicant, and to establish relatively short deadlines for submission of such documents.

Although first instance bodies are already obligated under Article 228, Paragraph 2 of the LGAP, practice shows that some public authority bodies frequently refuse to provide the Commissioner with relevant documents, which can lead to serious delays in the appellate proceedings.

The above noted peculiarities of the procedure of access to information of public importance often require that the Commissioner takes certain procedural action in the absence of the party requesting access to information of public importance. Such procedural action is called an *in camera* proceeding, and signifies a procedural action whereby the Commissioner in his appellate role requests the information for inspection. These actions are required primarily by the principle of material truth contained in Article 8 of the LGAP. In practice, this action usually entails review of documents granted the status of a secret or a business secret, which the Commissioner inspects in the premises of a given public authority body. Obviously, the process of access to information would be frustrated if an applicant or a third party was present during the *in camera* proceeding, as it would enable the party to become familiar with the contents of the document even before the character of the document would become known.

The procedure of access to information of public importance also requires an amendment to the provision regulating the right of parties to review documents within the administrative procedure. Article 70, Paragraph 1 of the LGAP stipulates that parties are entitled to inspect an administrative file, and to transcribe or to copy the file. Should this provision apply to the procedure of access to information of public importance, the applicant could inspect the file of the Commissioner and

familiarize himself with the contents of the requested document (should the document be enclosed in the Commissioner's file). This would render the decision making process upon a request for access to information of public importance meaningless, since the goal of the process is to determine whether a document should be made available to the public.

In order to prevent misuse of the provisions of the LGAP, it would be necessary to separately regulate the right of parties to review documents in the proceedings of access to information of public importance. The solution from the Slovenian Information Commissioner Act can be used as an example, whereby in Article 12 it stipulates:

The parties' right to examine documents in cases of access to information according to the Act governing the general administrative procedure excludes the examination of the requested document and other documents of the case, which could reveal or point to the contents of the requested information. After the final decision of the Information Commissioner the parties' right referred to in the previous paragraph of this Article includes the examination of the requested document within the frame allowed for, by the final decision of the Information Commissioner.

The Serbian FOIA Article 27 stipulates that an administrative dispute could be initiated against the decision of the Commissioner. Article 27 reflects the right to judicial protection, one of the basic human rights guaranteed by Article 22 of the Constitution of the Republic of Serbia. The guarantee presents a fundamental requirement of each modern and democratic society whereby an application procedure must ultimately include appellate review. Since an appellate proceeding could delay the timely receipt of requested information, we recommend a provision ensuring prompt and prioritized proceedings for administrative disputes against a decision by the Commissioner.

Article 28, Paragraph 1 of the Serbian FOIA stipulates that decisions and conclusions of the Commissioner are binding, while Paragraph 2 of the same Article stipulates that the Government of the Republic of Serbia will ensure the enforcement of decisions and conclusions of the Commissioner, if necessary. The legislature's intention in Article 28, Paragraph 2 is not clear. It could be concluded that the legislature's intention was to regulate the enforcement of decisions and conclusions of the Commissioner differently than prescribed in Chapter IV of the LGAP, whereby the enforcement is to be conducted by bodies that have decided upon the matter in the first instance. Considering that the Law explicitly states that the Government will ensure the enforcement "if necessary," it is more likely that the legislature's intention was to provide an additional guarantee of the enforcement of decisions and conclusions of the Commissioner.

Such a conclusion is arguable, as it is unusual that the legislature anticipated the non-compliance of public authority bodies with the LGAP with respect to the en-

forcement of decisions and conclusions of the Commissioner. On the other hand, the enforcement of the Commissioner's decisions by the Government is problematic from the standpoint of independence and autonomy of the Commissioner. Irrespective of the stated concerns, the aforementioned interpretation is not without merit.

A strict application of the provisions of the LGAP on enforcement of decisions to a proceeding related to access to information of public importance could lead to an absurd situation whereby a body could be compelled to execute a decision against itself. In cases where the Commissioner orders a first instance body to transmit the requested information to an applicant, the fact that an enforcement of a decision has been taken indicates that the first instance body has not provided the information in accordance with the order of the Commissioner.

In such a case, a first instance body would thus have to decide, upon a motion of an applicant, on the enforcement of a decision against itself. Considering that it is unrealistic to expect efficient enforcement of a decision from a body which does not respect decisions of a body superior to it, introduction of an additional guarantee by the legislature would be prudent. As noted earlier, the choice of the body vested with the role of an additional guarantor of the enforcement of decisions and conclusions of the Commissioner is a problematic aspect of the solution. A better solution is that the Commissioner, rather than the Government, is given the power of enforcement as this would preserve the Commissioner's autonomy and independence, and would provide him with additional tangible authority.

3. Summary

The Serbian FOIA, in principle, satisfies the most important conditions of a request procedure, as formulated in modern democratic systems. A detailed analysis has, however, indicated certain weaknesses in the Law that should be removed in the future. For a clearer overview, they have been summarized in the following points:

- 1) Insufficient regulation of the situation when the first instance body extends the deadline for consideration of the request of the applicant on justified grounds (Article 16, Paragraph 3).
- 2) The law is unclear whether the stipulated deadlines also apply to situations where the public authority body rejects the applicant's request (Article 16, Paragraphs 1–3).
- 3) The Law does not fully enable the applicant to determine the manner (form) of viewing or receiving information of public importance (Article 18, Paragraph 2).
- 4) The Law does not specifically regulate cases where the applicant believes that the information provided does not present the information of public importance which he requested in the application.

- 5) The Law does not expressly regulate access to information of public importance that is, at the same time, an original work, and is, as such, subject to copyright law.
- 6) Unreasonable and incomplete regulation of a procedure to be followed in cases where the first instance body does not have the requested information in its possession (Articles 19 and 20).
- 7) The Law does not grant public authority bodies the discretion to decide whether to request the reimbursement of necessary costs for duplication and sending of the requested document from applicants (Article 17, Paragraph 2).
- 8) The Law stipulates that public authority bodies shall calculate such costs directly on the basis of the List of Expenditures which will be determined by the Government, thereby precluding them from recalculating the costs in the amount lower than the one prescribed in the Government's List (Article 17, Paragraph 3).
- 9) Appeal against a decision or "silence" of the National Assembly, the President of the Republic, the Government of the Republic of Serbia, the Supreme Court of Serbia, the Constitutional Court and the Republic Public Prosecutor's Office in the administrative procedure is not allowed (Article 22, Paragraph 2), nor is the decision of the Commissioner pursuant to Article 25.
- 10) The Commissioner does not have at his/her disposal all authority related to inspection and supervision.
- 11) The Commissioner is not able to take procedural actions *in camera* according to the Law.
- 12) The statutory solution regarding the right of the parties to review documents does not take into consideration specific aspects of the procedure for access to information of public importance.
- 13) The statutory solution regarding the Government's enforcement, if necessary, of decisions and conclusions of the Commissioner threatens the independence and autonomy of the Commissioner.

Relationship between the Law on Free Access to Information of Public Importance and Other Procedural Laws

The scope of the Law on Access to Information of Public Importance is very broad as it practically covers all areas of work of public sector subjects. For this reason the provisions of FOIA could come into collision with provisions of other regulations. Conflicts should be resolved in accordance with general principles of legal theory. This chapter will focus on examining the relationship between the Serbian FOIA

and provisions of other procedural laws in the Republic of Serbia with respect to the right to inspection of documents.

In practice, applicants often request documents that are part of a certain court or administrative file. Practically speaking, all procedural laws recognize the right to inspect and copy documents only for parties to the proceedings, and those persons who can demonstrate having a justified interest.

Article 145 of the Serbian Civil Procedure Law⁵ stipulates that the parties shall have the right to inspect, photocopy and transcribe a court document related to a proceeding to which they are a party. Other persons with a justified interest could be allowed to inspect and to transcribe certain documents. During the course of proceedings, such permission would be granted by an acting judge, while upon conclusion of proceedings permission would be granted by the court president or a court official designated by the court president. The Criminal Procedure Code⁶ regulates the right to inspect documents in Article 170 by stating that: Anyone having a justified interest may be permitted to examine, transcribe, and copy particular criminal files (Paragraph 1).

When proceedings are pending, actions referred to in paragraph 1 of this Article shall be permitted by the authority conducting the proceedings and by the president of the court or an official designated by him when proceedings are terminated. If the files are kept by the State Attorney, the actions referred to in Paragraph 1 of this Article shall be permitted by him (Paragraph 2). If the public is excluded from the trial, or if the right to privacy would be violated by permitting the actions referred to in Paragraph 1 of this Article, these actions may be denied or conditioned by a prohibition against making public the names of parties participating in the proceedings. Against a ruling on denying the actions, an appeal may be filed which shall not stay the execution of the ruling (Paragraph 3). The provisions of Article 60 and Article 74 of this Code shall be applicable for actions referred to in Paragraph 1 of this Article if affected by a private prosecutor, subsidiary prosecutor, injured person and defense counsel (Paragraph 4). The defendant or the suspect, if interrogated according to the provisions on interrogation of the defendant or after an indictment without investigation has been preferred (Article 244), has the right to examine the files and observe the objects which serve as evidence (Paragraph 5).

The Law on the General Administrative Procedure in Article 70 stipulates that parties are entitled to inspect a file and to transcribe or copy necessary documents at their own cost. Inspection and transcribing, or photocopying of documents contained in a file, can be performed under the supervision of an official (Paragraph 1). The right to inspect and to transcribe or photocopy documents from the file, at his/her own cost, also belongs to any third party who can show a personal legal interest (Paragraph 2).

5 Official Gazette RS, no.125/2004.

6 Official Journal SRJ, no. 70/2001 and 68/2002 and Official Gazette RS, no. 58/2004, 85/2005, 115/2005 and 85/2005.

Article 70, Paragraph 4 of the Law on General Administrative Procedure stipulates that certain documents cannot be inspected, transcribed or photocopied: record of deliberation and voting, official submissions and draft decisions, as well as files that have been denoted as confidential, if that would violate the purpose of the proceedings, or if it would be contrary to the public interest, or the justified interest of one of the parties to the proceedings or of the third party.

Considering that the above-stated legislative provisions enable access to information contained in the files only to persons who can demonstrate a justified interest and prohibit access to certain documents, while FOIA stipulates that an applicant is not obliged to demonstrate a legal interest in his/her request, the question arises as to which provisions would apply should applicants request documents from a certain court or administrative file.

This conflict is difficult to resolve, since FOIA represents a more general and subsequently enacted legislation when viewed in relation to the procedural laws. At the same time, the Serbian FOIA itself does not contain any provision which would indicate that the legislature intended to amend specific provisions of existing procedural laws through FOIA. The answer depends, then, on the legislature's intention. Serbia's FOIA, however, resolves this dilemma with respect to cases where a special law explicitly requires confidentiality or stipulates a prohibition. Article 9(5) stipulates that a public authority body shall not allow the applicant to exercise the right of access to information of public importance if it would enable access to information or a document qualified by regulations or an official document based on the law, to be kept as a state, official, business or other secret, or if such a document is accessible only to a specific group of persons and its disclosure could seriously, legally or otherwise, prejudice the interests that are protected by the law and outweigh the interests of access to information. Therefore, it follows that in cases where a specialized law specifically prescribes confidentiality, i.e., prohibition of publicizing a record of deliberation and voting, the specialized law under the theory of *lex specialis* would govern.

Irrespective of the fact that FOIA, as a more general regulation, does not amend procedural laws through its explicit provisions, a conclusion can still be drawn from its provisions that the legislature did intend to secure publication of all information not explicitly exempt from the public access, disclosure of which would not harm certain public interests. Although FOIA is a law that is indeed more general (but also newer – *lex posterior*), it represents a “key law” regulating the area of access to information of public importance and should apply in proceedings regulated by specific procedural laws.

Nonetheless, *lex specialis* would still govern in cases where public access to certain information is specifically exempt by such a law (i.e., record of deliberation and voting of the judicial panel). In such cases it is clear that the intention of the legislature was to prevent the public from accessing such documents. As for documents where there is no specific and absolute prohibition of public disclosure, FOIA, as the “key law” in the area of access to information of public importance, should be applied.

We believe, therefore, that a public authority, upon receiving a request for access to information contained in a certain file, is obligated to grant an applicant access to requested information without requiring him/her to demonstrate a legal interest, providing that the following two conditions are cumulatively fulfilled:

- *Lex specialis* does not specifically stipulate confidentiality, i.e. prohibition of publicity of the requested information; and
- None of the exceptions in FOIA Articles 9, 10, 13, and 14 applies.

Thus, where *lex specialis* does not contain an explicit order of confidentiality, public authority bodies must rely on the FOIA exceptions to reject an applicant's request.

As discussed above, these exceptions are formulated in a relatively general and extensive manner (for further details see chapter on exceptions), which could provide public authority bodies discretion to reject requests. It should be noted that a party to the proceedings or another participant who could demonstrate a legal interest could inspect a file in its entirety, while an applicant using FOIA would potentially have access only to certain documents, in accordance with the so-called limited access. A FOIA applicant, therefore, has fewer rights than a party to the proceedings, which is understandable and justified.

*Comments by the Commissioner for Information
of Public Importance of the Republic of Serbia:*

By analyzing the relationship between the Law on Free Access to Information of Public Importance and other, primarily procedural, laws as well as possible solutions to conflicts of law, the authors conclude that the Law on Free Access to Information of Public Importance presents a "more general" and subsequent regulation than the procedural laws, and that FOIA does not contain any provision which would indicate that the legislature intended to amend specific provisions of the existing procedural laws by enacting FOIA. They also conclude that in cases where procedural law contains provision(s) restricting access to information, *lex specialis* should be applied.

From our position and particularly our experience, such a conclusion is worrying. Acceptance of such a position could completely rob the Law on Free Access to Information of Public Importance of its purpose. The Law on Free Access to Information of Public Importance is the only law which exclusively regulates free access to information of public importance held by public authority bodies, and as such, it undoubtedly represents *lex specialis* in relation to procedural and other laws with respect to its subject matter, including the issue of restriction of the right of access to such information. The Commissioner for Information of Public Importance has historically insisted precisely on this position. This position is, furthermore, supported by practice of other legal systems and by certain important international documents such as the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, which among other things, explicitly stipulates that in case of any inconsistency with other laws, the access to information law should prevail.

The question of the actual incompatibility of procedural and other laws with FOIA is a separate issue, one that follows partly from the fact that relevant laws were adopted prior to FOIA and partly from the lack of attention devoted to the consistency of regulations within our legal system with regard to laws adopted after FOIA. This state of affairs should not be accepted as a rule, as that would be contrary to general principles of the legal profession, but should rather be seen as a reason for changing such a status. This will require greater attention on the part of those responsible for the unification of our legal system. To date, this attention has not been expressed to a sufficient degree. In that sense, procedural and other laws should, with respect to the right of parties to access information contained in files, contain a provision referring to the application of the Law on Free Access to Information of Public Importance in this respect. Moreover, the Law on Free Access to Information of Public Importance stipulates ample grounds for limiting public access when it would be necessary for the purpose of protecting a legitimate interest which could be placed at risk should the information be revealed to the public. The Law, however, only makes references to such grounds (secrecy, privacy, etc.) and does not define them because they are a subject matter of other laws. Therefore, it makes sense to repeat once again that it is not only good, but that it is also necessary for Serbia to adopt new laws on classification of data, data protection, and potentially other matters to conform with current standards.

*Comments by Nemanja Nenadic, Transparency Serbia
(Coalition for Free Access to Information of Public Importance):*

The author incorrectly states that FOIA is a “general” law rather than *lex specialis*. It is a *lex specialis* law when regulating the exercise of the right to access information, regardless of the characteristics of various applicants. The fact that procedural laws guarantee certain special rights to particular categories of persons does not mean that they are *lex specialis* vis-à-vis FOIA, considering that they regulate the exercise of this right on grounds different from that of FOIA.

Analysis of the Law on Free Access to Information of Public Importance: the Right to Protection of Personal and Secret Data

Section 4 of the Assessment analyzes the Serbian FOIA from the perspective of the right to protection of personal and secret data, one of the exceptions stipulated in Article 14. This section begins with a historical overview of the right to protection of personal data under Serbian and international law, analyzes the principle of proportionality, and makes recommendations for changes in the discussed provisions of FOIA.

1. Overview

During the analysis of the Serbian FOIA, what has particularly emerged is the absence of systematic regulation in the field of protection of personal data. The Law on Protection of Personal Information was adopted in Serbia on May 15, 1998.¹ However, a vast majority of interviewees were not familiarized with the existence of this law.²

The fact that even judges and prosecutors, who should be most acquainted with the existing legal framework, had no knowledge of the stated law only highlights the necessity for systematic regulation of protection of personal data and the supervision of the exercise of this right.

Regardless of the absence of an adequate law on protection of personal data, individuals who answered the survey commented on the application of this right as one of the basic human rights when they make decisions regarding the Serbian FOIA.³

The right to protection of personal data is a constitutional right in the Republic of Serbia. It was also set forth in the Charter on Human and Minority Rights of the State Union of Serbia and Montenegro. The stated regulations are further discussed in the following sub-chapters.

The right to protection of personal data is included in the Serbian FOIA as a part of the broader right to privacy covered by Article 14, which states that a public

1 Official Journal SRJ, no. 24/98 and 26/98, and Official Journal SCG, no. 1/03.

2 See the Chapter containing the analysis of the survey.

3 Id.

authority body shall not fulfill the applicant's right to access information of public importance if it would thereby violate the right to privacy, the right to reputation, or any other right of a person that is the subject of information, except if:

- The person has agreed;
- Such information regards a personality, phenomenon or event of public interest, especially a holder of a state or political post, and is relevant with regard to the duties that person is performing;
- A person has given rise to a request for information about him/her by his/her behavior, especially regarding his/her private life.

2. Right to Protection of Personal Data – Historical Overview

The right to protection of personal data, as one of the basic human rights, has been recognized in theory only relatively lately, in the second half of the last century. In the former Socialist Federalist Republic of Yugoslavia (SFRY), this field was first developed in theory and in practice at the end of 1960s.

The first decision⁴ of the former Constitutional Court of Yugoslavia on the issue of personal data (upon a motion of the then-existing Constitutional Court of Socialist Republic of Slovenia for the assessment of constitutionality from 1969) was passed in 1971.⁵ The Federal Bureau for Statistics of the SFRY had collected statistical data concerning income directly from individuals – for example, on education and occupation/position held, body and organization in which a person was employed, the amount of one's income derived from various sources, the number of family members and their incomes, country houses, motor vehicles owned by them and their family members – without any legal ground, and individuals obligated to pay taxes were required to provide such information. The data was supposed to be used only for statistical purposes.

The Constitutional Court of Yugoslavia ruled as follows:

The General Director of the Federal Bureau for Statistics was not authorized to order, in his decision on the collection of data on individuals who were obliged to pay state contributions on gross annual income in 1968, collection of such data (on individuals who were obliged to pay state contributions on gross annual income in 1968).⁶

The Court also stated,

In the course of the proceedings and at the public hearing, the General Director gathered and analyzed data in a manner which raises the question of the need

4 Source: Poročevalec Državnega zbora Republike Slovenija, no. 47/04.

5 Decision of the Constitutional Court of Yugoslavia, no. U 167/69, 17. 03. 1971.

6 Official Journal SFRY no. 55/68.

for the gathered statistical data to be published. The court did not deliberate this question beyond (the question of) its jurisdiction. The question whether the said data should be published, whether it reflects the real state of affairs, or whether it is useful, as well as other questions concerning its publication, should be the subject of a separate hearing and a separate decision. What, however, clearly follows from the position of the Constitutional Court of Yugoslavia is that the mentioned data was collected pursuant to unlawful legal documents.⁷

In 1987, the Constitutional Court of Yugoslavia, upon a motion for the assessment of constitutionality of a law which regulated secrecy of data about foreign currency accounts of individuals, adopted a conclusion⁸ whereby it rejected this initiative, stating that “[A] statutory solution according to which data on savings and payments to foreign currency accounts of citizens are considered as a business secret is not inconsistent with the Constitution.” The Constitutional Court thus explained that regulating secrecy of certain data by law is allowed under the Constitution.

The conclusion stated in the previous paragraph is also important because Serbia still does not have a law on classified data which allows for discretionary classifying of documents with various levels of secrecy.

Among the adopted legal documents which are relevant for the purpose of this analysis, Article 24 of the Charter on Human and Minority Rights of the former State Union of Serbia and Montenegro should be mentioned⁹, as the right to protection of personal data was thereby raised to the constitutional level. The newly enacted Constitution of the Republic of Serbia¹⁰ also regulates the protection of personal data in Article 42.

- Protection of personal data shall be guaranteed.
- Collecting, keeping, processing and using personal data shall be regulated by the law.

7 See the conclusion of the Federal Constitutional Court of the Federal Republic of Germany, no. BverfGE I, 16. 07. 1969, Mikrozensus. With this conclusion the Constitutional Court created legal grounds in the Federal Republic of Germany whereby an unlimited collecting of personal data was prohibited, and above all, it was established that should personal data be made anonymous, it would thus lose its “personal” significance. Also, the Constitutional Court of the Federal Republic of Germany mentioned the limits of individual intimacy: This Questionnaire intrudes into the sphere of privacy, but it did not force the interviewee to discover his intimate sphere, nor did it provide an insight into certain relations to which the public did not have insight and which therefore, according to their character, are “confidential”. (...) Hence, this data does not fall within the scope of an internal field (field of intimacy) to which a State would not be able to have access, even with respect to a survey conducted for statistical purposes, without it being a violation of human dignity and the right of individuals to personal decision making.”

8 Constitutional Court of Yugoslavia, no. U376/87, 25.11 1987.

9 Official Journal of SCG, no. 6/2003.

10 At the time of writing of this analysis the Constitution of the Republic of Serbia had already been confirmed on referendum held on October 28th and 29th of 2006.

- Use of personal data for any purpose other than the one for which it was collected shall be prohibited and punishable in accordance with the law; unless it is necessary to conduct criminal proceedings or protect the safety of the Republic of Serbia, in a manner stipulated by law.
- A person shall have the right to be informed about personal data collected about him in accordance with the law, and the right to court protection in case of abuse.

As stated in previous chapters, a Law on the Protection of Personal Data exists in the Republic of Serbia, however, only a small percentage of public authorities that were interviewed for this analysis know and apply the law.

The definition of personal data contained in Article 3, Paragraph 1, Sub-paragraph 2 of the Law on the Protection of Personal Data states:

Personal data represents information contained in databases of such data, which relate to privacy, personal integrity, personal and family life and other personal rights connected to an identified person or a person which can be identified.

This definition is in accordance with definitions of personal data stipulated by a number of international documents that are relevant for the Republic of Serbia (for example, documents of the Council of Europe, and the European Union – with respect to the process of association). These documents are discussed further below.

3. Protection of Personal Data as an Exemption According to the Law on Free Access to Information of Public Importance – Positions Represented in Theory

In the majority of legal systems with a FOIA law, protection of personal data represents the most significant exemption, as it protects one of the most important basic human rights. This is not true for other rights, which are protected by exceptions to free access to information. Protection of personal data (otherwise known as “information privacy”) of an individual ensures that an individual can protect his own personal information if he does not want others to have the information.

The basic principle of the right to protection of personal data is the principle of proportionality. This principle determines that the scope and purpose of collecting and processing personal data must be appropriate. The principle of proportionality limits the processing of personal data, thereby restricting potential problems. For example, a supervisor would only have access to medical files in order to review data for a particular project. For the Serbian FOIA, proportionality means that an applicant only has partial access to data deemed public data, i.e., first and last name of a certain public servant, but not his home address. This principle, moreover, aids

the understanding of the processing of personal data, as it introduces a basic principle which must be followed by database creators when creating databases containing personal data.

The second important principle of the right to protection of personal data is the principle of legality. This means that personal data must be processed fairly and lawfully, and processing of personal data must be regulated by law.

The principle of the prohibition of discrimination means that the protection of personal data is guaranteed to everyone, notwithstanding their personal circumstances.

The definition of the processing of personal data differs from country to country. In the majority of cases, processing of personal data is more strictly regulated if it is publicly-conducted, rather than privately. The processing of personal data in the public sector is possible only if prescribed by law and upon personal consent (when consent is stipulated by law).

4. Relevant International Legal Documents

4.1. Council of Europe Documents

Within the Council of Europe (CoE), protection of privacy is mentioned in almost all documents relating to access to information of public importance and providing for protection of personal data. The first such mention was in the CoE Recommendation 582 (1970) on mass communication media and human rights.

On January 28, 1981, the CoE adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.¹¹ In 2001, the CoE adopted the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and trans-border data flows.¹²

The basic purpose of the Convention is to secure respect for the rights and fundamental freedoms, and in particular the right to privacy, with regard to automatic processing of personal data relating, for every individual within the territory of each Party, whatever his nationality or residence. The Convention mandates the protection of automatically processed personal data, but also allows Member States of the CoE to expand such protection to other personal data.¹³

11 ETS, No. 108.

12 CETS No. 181, Strasbourg, November 8, 2001.

13 See in detail ur. Pirc Musar et al., *Zakon o varstvu posebnih podatkov s komentarjem*, Ljubljana 2006, page 24.

CoE Recommendation (1981)¹⁹ on Access to Information Held by Public Authorities and Recommendation (2002)²⁰ on Access to Official Documents should also be mentioned here. These recommendations require Member States to recognize the right of everyone to have access to information held by public authorities within their jurisdiction, unless limitations to this right are necessary in a democratic society in order to protect privacy or other legitimate private interests.

4.2. Documents of the European Union

Within the European Union Regulation of the European Parliament and of the Council no. 1049/2001 regarding public access to the European Parliament (hereinafter: the EU Regulation)¹⁴, Council and Commission documents present the basis for processing personal data within the field of access to information of public importance. This Regulation introduces the principle of the broadest possible access to documents, the principle of the easiest manner of exercising this right, and the principle of encouraging administrative practice on access to information.

The EU Regulation places the protection of privacy and personal integrity among absolute exemptions, with an obligation to conduct the harm test in that respect. This means that the disclosure of personal data is allowed in cases where it would not jeopardize the privacy or integrity of an individual to whom the data relates.¹⁵

The basic EU document in the field of protection of personal data is the Directive 95/46/EC. The Directive covers, among other things, every form of processing of personal data, regardless of the technology used, and the transferring of personal data to third countries (which are not member states of EU). From the perspective of protecting personal rights, the most important provisions are the ones that refer to the introduction of a special, independent institution for the protection of personal data.

Protection of personal data is also stipulated in the Draft Treaty establishing a constitution for Europe (hereinafter: the Draft Treaty).¹⁶ Article 50 of the first part of the Draft Treaty prescribes that:

- 1) Everyone has the right to protection of personal data concerning him or her.
- 2) European law shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies and agencies, and by the Member States when car-

14 Enacted on May 30, 2001 and effective on December 3, 2001.

15 More: Prepeluh, Right to access information of public importance, Ph.D. dissertation, Ljubljana 2004, page 211.

16 Brisel, July 18, 2003, CONV 850/03.

rying out activities which come under the scope of Union law and the rules relating to the free movement of the data. Compliance with these rules shall be subject to the control of an independent authority.

In Part II, Article 8, Protection of personal data, the Draft Treaty prescribes,

- 1) Everyone has the right to protection of personal data concerning him or her.
- 2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right to access data collected concerning him/her, and the right to have it rectified.
- 3) Compliance with these rules shall be subject to control of an independent authority.

The Draft Treaty has not been confirmed in referendums held in a number of EU Member States. Accordingly, protection of personal data is still not regulated on a constitutional level in the European Union.

In 2003, the Court of Justice of the European Communities (the European Court of Justice) for the first time reached decisions on two cases concerning protection of personal data, as noted in the Directive 95/46/ES. The cases in question are *Rechnungshof v. Österreichischer Rundfunk and Others* with the joined case of *Neukomm and Lauremann v. Österreichischer Rundfunk*¹⁷, and *Bodil Lindqvist*¹⁸.

There is no independent body in charge of supervising the protection of personal data in the Republic of Serbia. Thus, an individual whose data is being processed does not have institutional protection of personal data that relates to him. An individual can only sue for damages in case of a violation of the right, which means that he cannot expect a prompt response from the state that would ensure the existence of a legitimate state of affairs, due to the fact that the majority of court proceedings are lengthy and often do not provide appropriate measures of addressing the injury. As well, *ex officio* court proceedings are never initiated. Accordingly, an individual does not have additional protection with respect to this matter, as he can initiate proceedings only if he is aware that there has been a violation. Inspection protects only certain broader public interests – for example, personal data of individuals from powerful individuals controlling databases of personal data (primarily the state).

A number of countries have introduced a new, independent state body, headed by an information commissioner. This body enables an efficient exercise of two rights – the right to information privacy and the right to know. Despite the potential con-

17 Joined cases C-465/00, C-138/01 i C-138/01, May 20, 2003.

18 Case C-101/01, June 11, 2003.

flict of interest in having both rights within the jurisdiction of one body, this practice provides great efficiency, as it enables a unified practice in two areas which are often the subject of the same proceeding.¹⁹

Prior to enacting this solution, in countries such as Slovenia, the Commissioner for Access to Information of Public Importance and the Inspectorate for the Protection of Personal Data might have had jurisdiction over the same or similar cases. In Slovenia, the Law on Administrative Disputes even allowed for one state body to sue another.

Notwithstanding the abovementioned criticisms of the joint approach, and considering the value of this solution, the authors of this analysis wish to recommend the establishment of such an *independent* state body in the Republic of Serbia. The Serbian Commissioner for Information of Public Importance already has the status of an independent state body, which is in accordance with the requirement set forth in the European Directive 95/46/ES to EU member states.

5. Analysis of the Law on Free Access to Information of Public Importance from the Perspective of Protection of Personal Data

As mentioned earlier, the right to protection of personal data is an exemption from the general right of free access to information of public importance set forth in Article 14 of Serbian FOIA. Article 14 states that a public authority shall not grant the applicant's request to access information of public importance if it would violate the right to privacy, the right to reputation or any other right of a person that is the subject of information, except if:

- The person has agreed;
- Such information regards a personality, phenomenon or event of public interest, especially a holder of a state or political post, and is relevant with regard to the duties that person is performing;
- A person has given rise to a request for information about him by his behavior, especially regarding his private life.

It should be noted that the Serbian FOIA does not specifically refer to personal data within its provisions, which makes it considerably broader than Article 3 of the Law on the Protection of Personal Data. The right to privacy incorporates a number of rights within it, one of which is the right to protection of personal data (i.e., information privacy). Judging by Article 14 of the Serbian FOIA, the legislature intended to extend the protection to the overall privacy of the individual. However, the Law does not protect merely an individual's privacy, but also his reputation.

19 In Slovenia, 30% of cases handled by the Information Commissioner relate to protection of personal data.

Such a solution is debatable when viewed from the perspective of general principles of access to information of public importance, prescribed by the aforementioned EU Regulation.²⁰ First of all, such a solution is debatable from the perspective of the principle of the broadest access to documents and the easiest possible exercise of that right. The current solution narrows the scope of information of public importance more than allowed by the EU Regulation, as it provides public authorities with too much discretion (in comparison the EU Regulation) and too many reasons for rejecting applications. Above all, such reasons may include an exemption which is strictly rejected by public information commissioners in the countries of the EU – embarrassment and damage to reputation.²¹

The main goal of the right to access information of public importance is to precisely reveal possible irregularities in the conduct of public authorities during the performance of their duties. The right to supervise the public administration in a participatory democracy is exercised through access to information of public importance. Individuals who have contracts or business relations with public authorities should also be subject to public supervision and must accept this infringement on their rights to privacy when they deal with the public administration.

This solution serves to reduce the impact of the third exemption in Article 14 and may be inconsistent with the Law on the Protection of Personal Data and the above-stated international documents relating to the protection of personal data. As stipulated in the third exemption, this provision could allow for broad access to public information into the private life of an individual. In our opinion, because information must be included in a document and be in the possession of a public authority, the Serbian FOIA does not apply to privacy (even of high officials) as the information from the private lives of individuals are not normally held by public authority bodies (apart from some personal data which fall within the narrow meaning of the right to privacy).

The current definition contained in FOIA could be interpreted to mean that a body deciding upon a request could disclose personal information based solely on the fact that it is interesting to the public. FOIA does not provide an explicit distinction between personal data which *is of the public interest* and the information which is merely *interesting to the public*. By introducing such an exemption (irrespective of the limitation stipulated in Article 8), the current solution narrows the scope of privacy and could unnecessarily jeopardize the privacy of an individual.

With the right combination of several FOIA provisions, an applicant could request information which may be related to a certain interest, but would still need to be

20 The authors are aware that the Regulation does not apply to Serbia. However, it will be considered in the process of Serbia's accession into the EU. All further references to the Regulation have been made pursuant to this viewpoint.

21 Canadian informational trustee John Reed noted, "Embarrassment is not one of the exceptions."

protected as an exemption (protection of personal data), and the public authority would be obligated to disclose it, due to the provision on reputation and the third exemption (i.e., "...if a person gives rise to a request for information with his/her behavior..."). For this reason, we recommend the adoption of the law on the protection of personal data and the establishment of an independent state body which would have jurisdiction on an institutional level to ensure an individual's right to protection of personal data.

Notwithstanding the above-stated, such a solution could raise issues with respect to the new Constitution of Serbia.²² Article 20 states that human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for a purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right. As described in the previous chapters, in our opinion both restriction on the right to access information of public importance and the right to protection of personal data could be constitutionally disputable.

The right to protection of personal data is, however, a constitutional category. Nonetheless, by applying the test of proportionality²³ to access to information of public importance, the right of access to information often prevails over the right to protection of personal data. Consideration should be given to a possible change in Article 14, whereby the protection of reputation would be removed from the list of exemptions from access to information.

Furthermore, it is this author's view that the language of Article 14 which states "...if it would thereby violate the right to privacy," is too broad because as "the highest" right it also covers other rights, for example, the right to secrecy of internal documents. Where an applicant has requested an official letter of an individual addressed to a state body, a public body could argue protection of the secrecy of internal documents and access could be denied according to Article 14 even though it meets the general FOIA standards.

Naturally, not every invocation of the right to privacy is inconsistent with the principle of access to information of public importance. The Serbian FOIA, however, does

22 During the writing of this analysis, the Constitution of the Republic of Serbia had already been confirmed by referendum on October 28-29, 2006.

23 The test of measuring constitutional rights is recognized for example by the Constitution of the Republic of Slovenia (Official Journal RS, no. 33/91, with amendments), which in Article 15.3 states that human rights and basic freedoms are limited only by rights of others and in cases prescribed by this Constitution. The Constitution of the Republic of Serbia does not recognize that kind of measuring test, but it recognizes the indirect test of consideration on the legislative level (in the form of limitation of constitutional rights by a law), as prescribed in Article 20 of the Serbian Constitution. The Public Interest Test is introduced for Member States by Recommendation No. (2002)2 of the Council of Ministers, on access to official documents.

not explicitly stipulate when one right outweighs the other, nor does it reference any laws on protection of personal data that would further regulate the conflict between the two rights. Therefore, in this respect the law allows for discretionary decision-making of authorized bodies for access to information of public importance.

The Serbian FOIA allows inspection of documents containing personal data if the person concerned consents to it. This conforms with Article 7, Paragraph 1, Point 2 of the Regulation 95/46/EC, which provides that personal data can be disclosed if a person has agreed. The information of public importance should be judged independently from the consent of the individual. The fact that a certain document has the status of information of public importance and contains information on the privacy of an individual does not require consent of the individual to which that information relates. It is possible that certain information of public importance could simultaneously be personal data, however, data which is not protected.

Requesting consent from an individual to whom the personal data relates could infringe upon the access to information of public importance. Thus, this provision should be interpreted only to signify that the information about an individual, which would be rejected by the authorized body according to FOIA, can be disclosed to the public provided that the individual concerned has consented to disclosure, despite a possible right to invoke an exemption which would protect the data.

The authors of this research see the introduction of a specific exemption from access to information of public importance for protection of personal data, i.e., information privacy, as one option for eliminating irregularities presented in previous paragraphs. Such an exception should be defined and interpreted narrowly. Moreover, such an exception should provide for balancing as a part of the harm test.

The exemption from Article 14(2) of the Serbian FOIA, which provides for disclosure of personal data (data concerning a person) if it concerns a public figure, especially if he is holding a state or a political post and the information is relevant considering the function performed by that person, has also been narrowly defined. It follows from this provision that the “work of a public official” is not fully under public supervision, as FOIA restricts such supervision with two conditions: 1) it must be a person of interest to the public; 2) information must be relevant considering the function performed by that person.

As previously stated, an important purpose of FOIA is supervision of the work of public authority bodies (i.e., the work of public servants) and the use of public funds. If the law would infringe upon this right by allowing judgments to be made as to whether the public interest exists and whether the information is important considering one’s function, such an exemption would again allow public authority bodies to exercise discretion in decisions against an applicant.

On the other hand, from the standpoint of the protection of personal data, such a solution is appropriate due to the absence of *lex specialis*. It should be argued that FOIA is *lex specialis* and that it supersedes the Law on the Protection of Personal Data in the area pertaining to the work of public servants and the use of public funds. It is precisely these two activities that are, in the majority of cases, supervised by applicants.

In light of the above, we recommend changes to the discussed provision. As an example, we provide the definition contained in the Slovenian FOIA.²⁴ Article 6, Paragraph 3 states that the access to the requested information – notwithstanding the provisions of Paragraph 1 (in which the Law enumerates exemptions, including personal data) – should be allowed if it concerns data on the use of public funds or the information is related to the execution of public functions or the employment relationship of the civil servant.

Comparing the Slovenian and Serbian provisions clearly suggests that the Slovenian legislature intended applicants to have unconditional insight into the work of public servants and to the use of public funds, even from the standpoint of the protection of personal data. The Law, accordingly, did not introduce additional conditions which would enable public authority bodies to legitimately conceal information of public importance. On the contrary, the Serbian legislature decided to subject access to the requested information to consideration of the existence of conditions such as those stated above.

When one considers the introductory text of the referenced article, it could be inferred that a positive decision would violate an individual's privacy and reputation even in a case when, according to the generally accepted standards of the EU and the CoE, that should not happen. In a famous decision of the European Court of Human Rights (the Court), *Von Hannover v. Germany*²⁵, the Court set forth the rule on the limitations to privacy. The Court's most significant conclusion is that even public persons (i.e., individuals constantly subject to public scrutiny within a society) have a *par excellence* right to expect that their private life would be protected.

Rulings based on the Serbian FOIA could, therefore, conflict with the practice of the European Court of Human Rights.²⁶ We point out that infringement upon the privacy of an individual (viewed from the broader context and not only from the

24 Official Journal RS, št .51/06, officially cleared text 2.

25 Application no. 59320/00, verdict from June 24, 2004.

26 Serbian FOIA, as opposed to the Slovenian FOIA, does not stipulate that a personal data existing within the framework of information on the work of a public servant or on the use of public funds is not protected. The threshold set up by the Slovenian FOIA is that it restricts access to personal data on the work of public servants. Everything below that threshold infringes upon the privacy of an individual.

standpoint of the protection of personal data) is even more possible since the Law on the Protection of Personal Data does not encompass the complete scope of the right to privacy. Above all, manipulations similar to those described above would be possible in the area of the right to privacy which is not protected by the Law on the Protection of Personal Data. The discussed exemption should, therefore, be defined in more detail.

Law on Free Access to Information of Public Importance and Secret Data

We wish to highlight that in addition to the absence of legislative regulation of the basic human right to protection of personal data, the Republic of Serbia also lacks a law that would regulate classification of documents in an appropriate fashion. Primarily, the fact that Article 9(5) of the Serbian FOIA stipulates secrecy as one of the exemptions only underscores the necessity for the law on classified data to be adopted as soon as possible. This legal void is likely to lead to a violation of the principle of the broadest possible access to documents, as provided by the EU Regulation, since public authority bodies could grant secret status which should otherwise not be denoted as such.

Notwithstanding the above, a need for the protection of fundamental interests of the state is widely recognized on the international plane.²⁷ Therefore, the protection of fundamental interests of the state can represent a legitimate ground for rejecting a request for access to information of public importance. As with all other exemptions, it must be interpreted as narrowly as possible. Since there is no legal framework regulating this area, the public authority bodies have been deprived of even a basic interpretation. The law on classified data should also regulate the issue of so-called internal documents.

27 More, Prepeluh, Right to access information of public importance, Ph.D. dissertation, Ljubljana 2004, page 172.

The Public Interest Test from the Aspect of the Law on Free Access to Information of Public Importance (Serbian FOIA)

This section focuses on the “public interest test” as a method for evaluating the validity of an exception to the right to freely accessible information. As a starting point for her discussion, the author declares that the public interest test does not exist in the Serbian FOIA. The author makes recommendations for amending FOIA and provides excerpts from other countries’ laws and international law as examples. Comments by Nemanja Nenadic of Transparency Serbia, reaching a somewhat different conclusion, are included.

The public interest test introduces the methods of constitutional law into the right of access to information of public importance. The principle of proportionality, from which constitutional courts and commissioners (appellate bodies for the protection of access to information of public importance) have developed a three-prong test, offers valuable help in performing the public interest test.

It is necessary to be aware that the proportionality test is performed only in cases of concurrent implementation of two basic human rights, or more basic human rights and other rights and interests that are protected by the constitution. The public interest test could be used in evaluating exceptions from free access to information, which are not aimed towards protection of a human or other constitutional right or vital interest: the rights of, for instance, business entities (business secrets) or of the public sector bodies (secret information, tax secrets of legal entities, etc.).

In order to properly understand the public interest test, it is necessary to know several general types of exceptions. Only three groups of documents are exempted from the basic principle of free access to information of public importance:

- 1) Information which, by its content, is not information of public importance (such as a personal health booklet, passport, or private messages on an official email address).
- 2) Documents which, by their substance, are information of public importance, but for other reasons are exempt from disclosure (“exclusions”). In older legal systems of other countries, the legislature has often excluded, *a priori*, certain information of public importance from the general rule of access to public authority bodies, especially the security services, or has excluded certain types of information. In the Serbian FOIA, there are no exclusions.
- 3) Documents which are not freely accessible and which represent exceptions from access in accordance with the law. Those exceptions are

categorized into relative and absolute. Relative exceptions are those to which the public interest test might be applied. Absolute exceptions apply when a document contains information that falls within the definition of some of the absolute exceptions, even if the public interest could be predominant compared to some other interest.

- 4) Documents not accessible due to EU exceptions according to the Regulation (ES) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001, regarding Public Access to European Parliament, Council and Commission Documents¹. This fourth category will apply only when Serbia becomes a member of the European Union.

Since we are of the opinion that there is no public interest test in the Serbian FOIA, all exceptions in this law are ranked among the “strict” absolute exceptions, which are somewhat “loosened” through the harm test. The harm test is used by an obligated subject to determine whether disclosure of documents would cause harm to a particular protected person, object, or right. Exceptions are also regulated by the three-part test from Article 8 of the Serbian FOIA.

1. The Public Interest Test

This test is essentially a variant of the balancing test, through which the public authority body, an appellate body, or the courts during an administrative dispute, assess whether the public’s right to know is overridden by some other right or exception from the law, even if disclosure would inflict harm. The British Public Information Commissioner states that the public interest test does not reveal what is *interesting* for the public, but what is *in the public interest*.

There are positive and negative factors that must be considered when balancing the public interest with the exception:

- 1) The public interest will likely be strong in the following circumstances:
 - Highlighting the issue which is currently under deliberation will contribute to a better understanding of the issue;
 - The issue has initiated a public or parliamentary debate;
 - Relevant public debate is not possible without free access to relevant information;
 - The issue affects a large number of private and legal entities;
 - The issue affects the public security and public health;

1 Official Journal of EU, L 145, May 31, 2001, pages 0043–0048

- Disclosing information contributes to accountability and transparency of decision-making;
 - The issue concerns acquisition and use of public resources.
- 2) Factors that may weigh *against* disclosure are largely those stated in the exceptions, which can also be connected with other facts; for instance, in a case of violation of human rights, or in cases where disclosure might influence the right to a fair trial.
- 3) Facts which are not relevant for use in the public interest test include:
- Damage to reputation of a public official;
 - The possibility of loss of trust in a public institution;
 - The assumption that information is too technically demanding and would not be understood by an average citizen;
 - That the information is incomplete and might mislead the public or that the information is wrong (in such a case, it is necessary to explain the context of the information when it is made public).

What does “the public” mean? The definition is not found in any law. This phrase may be used as a geographical term, for example, the population of a city or citizens of a state. It may also be used in a quantitative sense, such as the majority of the population of a particular city.

In the area of public relations, there are several types of “public,” such as internal, external, professional, public, general, and political. For the performance of the public interest test, therefore, the type or size of the public is not relevant. Instead, it is important not to apply this test under circumstances when the information is sought only because of the private interests of one or more individuals. Ultimately, the decision will be made by those responsible for establishing which part or parts of society will be affected by application of the public interest test.

2. The Three-Prong Test

The three-prong test provides significant help in applying the public interest test and the harm test. The three-prong test is a court-created tool used to evaluate proportionality and is based on international law: the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe²

² See Articles 8–11.

and the International Covenant on Civil and Political Rights of the Organization of United Nations³. Both documents directly apply to the Serbian legal system.

When assessing the right to protection of personal information against the right of the public to know, the three-prong test is used to determine if the right to freedom of expression will override the right to privacy.

The three-prong test is to be used by courts and authorized persons in connection with matters in the area of access to public documents. It is based on the following factors:

- 1) Whether restriction of the right to information of public importance is prescribed by law;
- 2) Whether disclosure would mean a threat of serious harm to a lawful goal;
- 3) Whether the harm incurred to a legally-protected interest is greater than the justified public interest to possess that information.

In the first point, it is necessary to determine whether a basis for refusal is established in the law. The second point regards the extent to which the harm test needs to be performed. The third point establishes the use of the public interest test, based on an assessment of whether the public interest is greater than the harm incurred by disclosure of certain information.

Let us look at the possibility of using the three-prong test according to the Serbian FOIA. In the first part of the test, we must consider the restrictions to information. In the laws regulating access to public information, we usually find that the exceptions need to be interpreted narrowly, and, as a rule, as *numerus clausus* (unless the FOIA provides for other laws to establish exceptions).⁴

In the Serbian FOIA, the restrictions found in Articles 9, 13, and 14 are also found in Article 2, which defines information of public importance by virtue of criteria of the materialized form. This definition envisages that the document must exist at the time a request is made, that it should be in the possession of a public authority body, and that it was created in connection with the work of the public authority body. There is an additional criterion of a justified need to know, which states that

3 Adopted by the General Assembly of the UN on December 16, 1966, by Resolution No. 2200 A (XXI), enacted on March 23, 1976, in accordance with Article 49.

4 In Article 25, Paragraph 3 of the Law on Freedom of Access to Information (Federation of Bosnia and Herzegovina), there is an interesting solution: "Laws which are adopted after passing of this law, whose purpose is not to change or amend this law, shall not, in any way, restrict the rights and obligations as determined by this law."

information of public importance must refer to anything that the public might have a justified interest to know.

The requirement of a justified interest of the public is not found in the recognized standards of access to public information. Therefore, in the Serbian FOIA, we find balancing occurring as early as the very definition of the information of public importance, when there is still no possibility of refusal on the basis of exception, when viewed from the standpoint of the public authority body. Thus, it can be determined that requested information is not information of public importance, and access can be denied on that basis.

Such interpretation is perhaps a bit too narrow, because the public authority body will, in any event, prove that there is no justified interest of the public to know. Without considering the exceptions, proving that there is no justified interest of the public to know will be easier since the public authority body will not be bound by the exceptions. On the basis of the review of international practice, we can say that the public interest test is not contained in the formulation of Articles 2 and 4 of the Serbian FOIA.

*Comments by the Commissioner for Information
of Public Importance of the Republic of Serbia:*

The authors of the analysis state that the very definition of public information, given in the Law on Free Access to Information of Public Importance ("Official Gazette of RS" No. 120/04), provides a public authority body with an opportunity to freely conclude, unrelated to proscribed exceptions, that the requested information does not constitute an information of public importance and, on that basis, reject a request. The authors also state that Article 2 of the Law in fact introduces an additional exception to the already existing ones.

Such an interpretation is truly rigid and exceptionally narrow. Since the authors themselves say that such an interpretation is too narrow, it should be understood as a proposal to remove, as unnecessary, the "justified interest of the public to know" language from the definition of the term "public information" in Article 2 of the Law. This would prevent possible interpretations of the Law that would encroach upon the exercise of the right to free access to public information. It may be helpful to remind the reader that the Law, in Article 8, expressly forbids any kind of limitation of the right to free access to public information except exceptionally, in cases proscribed by the Law itself, and when such a limitation is necessary in a democratic society for the purpose of prevention of a serious violation of a weightier interest based on the Constitution or the law.

Following the rationale of the law in its entirety, it is obvious that, when determining the meaning of the term "public information", the legislature took the position that the information is everything that the public has a valid interest to know, including the stated elements of information, as a starting point to be further expanded through the provisions of the law, primarily Article 4 which covers the legal presumption of a justified interest.

The opportunity of the public authority to prove the absence of justified interest represents nothing more than the fact that a public authority body is, in this way, denying an applicant the right to free access to information, as the author herself has stated. This practically means that proving the absence of a justified interest (generally presumed to always exist), boils down to proving the existence of reasons to deny the right to free access to information. Bearing in mind that the provision in Article 8 of the Law explicitly states that the right to free access to public information may be only exceptionally subjected to limitations proscribed in the Law, denial of this right, that is, proving the absence of a justified interest of the public to know, is not possible in any other case than those prescribed in Articles 9, 13 and 14 of the Law. Moreover, exceptions provided by the said articles should be, according to generally accepted opinions and experiences of democratic countries, interpreted as narrowly as possible.

If the legislature's intent was to introduce the absence of a justified interest of the public as a separate reason for the limitation of the right to free access to public information, this reason would have been, viewed logically from the standpoint of the very rationale of the law, provided in one of the articles within Chapter II of the Law – Exemptions and Limitation of Free Access to Information of Public Importance. For this reason, in the absence of more precise terminology, there is no room for the interpretation that “the justified interest of the public”, from Article 2 of the Law, represents an additional reason for the limitation of the right.

In support of these assertions, we review the definitions in the Slovenian, Bosnian, and Croatian laws, as well as Regulation 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents.

For example, the definition in the Slovenian Access to Public Information Act is as follows:

Public information shall be deemed to be information originating from the field of work of the bodies and occurring in the form of a document, a case, a dossier, a register, a record or other documentary material (hereinafter referred to as “the document”) drawn up by the body, by the body in cooperation with another body, or acquired from other persons.

The law of the Federation of BiH has an interesting definition. In Article 1, it is established that a public authority body must hold the information, and in Article 3, information is defined as:

...any material which communicates facts, opinions, data or any other content, including any copy or portion thereof, regardless of form, characteristics, when it was created, or how it is classified.

The Croatian law also defines information of public importance “free from the burden of proof.” In Article 4, it establishes that all information controlled or disposed

by the public authority bodies must be accessible for interested beneficiaries of the right to information. In Article 3, there is a definition which is slightly more technical and which determines that information is data, text, photography, drawing, film, oral report, act, table, graph, plan or another attachment controlled or disposed by the obligees of the right to information, regardless of whether it is stored in a certain document and regardless of its source, date of production, place of storage, in whose name or on whose account the information was stored, or some other feature of information.

In Article 3 of Regulation 1049/2001, it is established that a “document” is any content whatever its medium (written on paper, stored in electronic form, or as a sound, visual, or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility.

The Serbian definition deviates from the standards set by the legislatures of Europe, as well as from the EU standards. It will be necessary to change the definition by excluding the requirement of a “justified interest to know” to avoid difficulties in interpreting restrictions on access to public information. Such a definition may create yet another bureaucratic obstacle for the applicants.

This writer personally sees this definition as a “reverse public interest test” which, rather than making exceptions easier, which is the basic goal of the public interest test, it actually narrows them.

*Comments by the Commissioner for Information
of Public Importance of the Republic of Serbia:*

The opinion of the author about the need to exclude the “justified interest of the public” language from the definition of information in Article 2 of the Law, as such a definition may be misused and may lead to the non-transparency of public bodies to the public, should generally be lent support. As has already been stated, the Commissioner agrees with this opinion but feels that, until the proper changes are made to the Law, provisions of this Article, or any other Articles, must not be interpreted in a manner that would decrease the realized level of the implementation of the Law.

How can the public authority bodies, on the basis of the aforementioned, use the three-prong test? In our view, its use is limited to the second prong of the test, while the third prong is outside the scope of an accepted public interest test, because according to the Serbian FOIA, once the harm test has been completed, there is no legal possibility for assessing the disclosure of a document from the perspective of the public interest.⁵

⁵ It is always possible to use the constitutional test of proportionality, but it is used only when dealing with constitutional rights. Secret data and business secrets remain outside the scope of the

*Comments by the Commissioner for Information
of Public Importance of the Republic of Serbia:*

The author's statements about the absence of any kind of legal opportunity to "assess how public a certain document is from the standpoint of public interest" as a part of a three-prong test, and the existence of a "virtual" test of public interest in our law, should be seen as statements made in good faith but extremely rigid and critical of the existing formulation. The overall rationale of our law, as well as all mentioned legal provisions, support the unquestionable obligation of state bodies to apply the public interest test. This is why the articulation of the comment, although extremely rigid, should be understood primarily as the authors' recommendation of a better, clearer, and a more precise legal formulation that would include explicit legal provisions on the implementation of a public interest test in cases when two interests collide. This would prevent different interpretations, make it easier for public authorities to act upon requests, and most importantly, prevent a denial or limitation of the right to free access to information.

According to the proportionality test in Article 8 of the Serbian FOIA, the procedure for evaluation is different. The third part of the test is significantly different, given that the public interest is not established by FOIA as criteria for balancing. In a classic proportionality test⁶ we balance only statutorily determined rights and other basic rights⁷, which is why we must use, on the grounds of Article 8, the three prong test for all other exceptions from freely accessible information listed in the Serbian FOIA, which must be modified by the harm test. In the Serbian FOIA, there is no public interest among the arguments for the disclosure of information.

*Comments by the Commissioner for Information
of Public Importance of the Republic of Serbia:*

The author concludes that the Law does not contain the public interest test, but that Article 8 only allows for a "classic test of proportionality, according to which we may balance only statutorily determined and other basic rights," and that the law does not contain the public interest among its values. Article 9 of the Law, according to the author's opinion, contains the harm test only, while Article 14 does not provide for it. In this connection, the author concluded, an explicit legal provision for execution of the public interest test is necessary.

constitutional proportionality test when solving the conflict between the constitutional rights of access to public information and protection of personal data.

- 6 (1) Necessity of infringement, (2) appropriateness of infringement to pursuit of a desirable, legitimate goal, and (3) proportionality as a balance between whether the end pursuit, which is aimed to protect or secure another constitutional right, outweighs the restriction imposed over a constitutional right.
- 7 The Serbian FOIA has upgraded even those exceptions which do not ensue from the Constitution, to the level of the Constitution (i.e., secret data).

Regarding this question, we can only agree with the statement of the author that existence of an explicit legal provision on execution of the public interest test would be useful in terms of precision of provisions and their application in practice.

Nevertheless, we cannot agree with the conclusion of the author that the Law excludes the public interest test, because it ensues from the provisions of Article 8 of the Law that this is necessary in a democratic society for protection from serious harm by a more predominant interest based on the Constitution or the law. Apart from this provision which generally applies to all exceptions established by Articles 9, 13 and 14, the provision of Article 9, Point 5 especially refers to the need to balance interests, that is, the public interest to know and the interests protected by this provision.

According to these provisions and the language of the Law in general, it is concluded that they especially point to the obligation of risk assessment and “balancing of interest” in each concrete case, in a way prescribed by Point 32 of the Recommendation (2002)2 of the Council of Ministers.

2.1. Elements of the Three-Prong Test

The first part of the three-prong test requires the public authority body to determine the following:

- **Whether a document exists** – A public authority body is not obliged to create new documents, only to provide existing documents already in its possession.
- **Whether the information was created during the work or in connection with the work of the public authority body** – The public authority body must have created the information during its work and during procedures for which it is responsible, in accordance with the general regulations. It follows that the information must have a connection with the area of work of the public authority body. It is not necessary for the public authority to have created the information itself; such information might result from the work of others, even from natural or private persons. The term “area of work” must be interpreted broadly, to include all aspects of procedures. This includes, for instance, the area of public purchase, employment of public officials, payment of salaries, payments to employees and associates who work on contract, and the like. Information of public importance should therefore refer to any content, in all areas of activity of the obligated subject that can be connected with its policies, activities and decisions, which are included in the scope or its responsibilities.
- **Existence of a justified public interest** – This restriction is explained in Article 4 of the Law, which states that a justified interest always

exists when the information refers to peril, protection of the health of the population, and the environment. The Law then prescribes a presumption of justified public interest in Article 2, unless the public authority body proves the contrary.

- **Existence of exceptions in the Law on Access to Public Information**
– In this segment of the three-prong test, it is necessary to determine if there is a legal basis for denying access to public information. In the Serbian FOIA, all six exceptions are given more in a form of some general clauses, and all of them contain the harm test.

In the second part of the three-prong test, the decision-maker must assess the harm caused to a certain right or individual or legal entity in connection with the document to which some of the exceptions from Article 9 may be applied (not from Article 14, which does not provide for the harm test).

In applying the harm test, the decision-maker should decide whether certain information otherwise covered by some of the exceptions (information may, at the same time, refer to other exceptions) should be disclosed to the public because such information does not (significantly) harm a protected vital interest.

If that is the case, it must be determined whether by “disclosing concrete information a (significant) harm would be caused.”⁸ This means that access to information of public importance may be denied only in cases where its disclosure would jeopardize a protected legal interest.⁹ Therefore, it is necessary to assess whether disclosure of a particular document or information of public interest could cause harmful consequences to a particular interest, or right.¹⁰ The burden of proof is on the public authority body, which must prove *in concreto* the harm caused.

The exceptions must be interpreted so that the harm to a legal interest is real, and not simply probable or hypothetical. European practice also requires actual and not simply probable or hypothetical harm to a protected legal interest. Hence, the harm test provides that all documents are accessible to the public, unless the institution proves that a protected interest could be harmed by its disclosure.

In the EU legal system, the harm test is required for all legal exceptions. The same is true for the Recommendation of the Council of Europe (2002)2, which strictly recommends that access may be refused only if disclosure of the document would harm, or if it is likely to harm, some of the listed legitimate interests.

8 Žurej u Čebulj Janez, Žurej Jirij, Varstvo osebnih podatkov in informacije javnega značaja, Nebra, Ljubljana September 2005, str. 222.

9 Pliščanič, Senko et al., Komentar zakona o dostopu do informacij od javnega značaja, Inštitut za javno upravo pri Ppravni fakulteti, Ljubljana, 2005, str. 91.

10 Pirc Musar, Nataša, Testi tehtanja s poudarkom na testu javnega interesa pri dostopu do informacij javnega značaja, Podjetje in delo 6–7/2005/XXXI, str. 1697.

The theory recognizes several harm tests, which are categorized by the degree of harm to the public interest which we wish to protect by exceptions. The harm test can be “soft” (if disclosure *could cause harm*), “medium” (if disclosure *would jeopardize or cause harm* to the protected interest) and “strict” (if disclosure *would seriously jeopardize or cause serious harm* to the interest).

Slovenian Law recognizes only the medium harm test, while the EU Regulation from 2001¹¹ uses two degrees. The Serbian FOIA uses two degrees, medium and strict (if the disclosure of a document would harm or significantly lower the level of a protected interest).

The third prong of the three-prong test contains the public interest test, which dictates that the document may be disclosed to the public, regardless of the *in concreto* proved harm, if it has been assessed that the public interest is greater than the harm that would be caused to the protected interest. Such a possibility may be provided to applicants, in order to refer to this test, and the public authority bodies, in order to use this test as grounds for decision-making, only by law on access to information of public importance, or some special law for particularly established exceptions to the principle of free access. Therefore, an explicit legal provision is necessary to perform the public interest test.

The essence of the right to access public information is free access to information; therefore, parties seeking disclosure of information are not required to show a legal interest (such as establishing that information is necessary for a criminal, civil or administrative procedure, that it is needed for resolving personal problems, or needed as a proof of some rights relating to work, etc.). The basic principles of fundamental human rights require that, in implementing those rights, there should not be obstacles.¹²

The Serbian FOIA, in effect, imposes such an obstacle, not by requiring proof of some concrete legal interest, but by having the requirement of the public's need to know particular information. The legislature has transferred the burden of proof to the obligated public authority bodies making the decisions about access to information of public importance. Hence, it could be inferred that Article 2 of the Serbian

11 Regulation (EC) No.1049/2001 Regarding Public Access to European Parliament, Council and Commission documents.

12 Such instruction is provided to the member states by the Council of Europe in the Recommendation (2002)2: “Member states should guarantee the right of everyone to have access, on request, to official documents, held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.” Recommendation (2002)2 of the Committee of Ministers to Member States on Access to Official Documents URL: <http://wcd.coe.int/ViewDoc.jsp?id=262135&BackColorInternet=9999CC&BackColorInternet=FFBB55&BackColorLogged=FFAC75> (15/ 11/ 2006). Regulation (EC) No.1049/2001 Regarding Public Access to European Parliament, Council and Commission documents.

FOIA represents an additional exception with other exceptions listed in Articles 9 and 14. Such an exception tends to conceal the information (with the burden of proof on the public authority body) rather than revealing it in terms of the overriding public interest.

For comments by the Commissioner for Information of Public Importance of the Republic of Serbia, please see page 13.

3. Formulation of the Legislative Provisions in which the Public Interest Test can be found

In most laws, the public interest test is included in the chapters determining the exceptions, which is logical, because the legislature may establish, for some exceptions, (apart from the harm test) that no additional balancing be required (absolute exceptions) or to allow the balancing of the public interest for particular, specified exceptions (relative exceptions).

Out of 68 states in the world which have a law on access to public information, as of November 2006, only about one-third of the laws have the public interest test.¹³ The use of this test is one of the most recent guidelines in considering access to public information, because the majority of the states adopted it after 1977.¹⁴ As of 2002, the Council of Europe, in its Recommendation (2002)2, recommended that all of its member states adopt the above-mentioned test.¹⁵ Yet this recommendation is not acknowledged by many legal systems even though such balancing test is required by the directly applicable Aarhus Convention.¹⁶ The public interest test may also be found in Directive 2003/4/ES of the European Parliament and of the Council on Public Access to Environmental Information and in Regulation 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents, which, like the Aarhus Convention, will directly apply to acts upon ratification.

The public interest tests for access to information of public importance can be found in a number of states worldwide. These states include, among others, Great Britain,

13 Banisar David, *Freedom of Information and Access to Government Records Law Around the World* Freedominfo.org, 2006, <http://www.freedominfo.org/countries/index.htm>.

14 Ireland 1997, Estonia 2001, Great Britain 1/1/2005, India 16/05/2005...

15 Recommendation (2002)2: "Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in Paragraph 1, unless there is an overriding public interest in disclosure."

16 Serbia has still not ratified this convention. States that have ratified the Convention may be found on <http://www.unece.org/env/pp/reports%20implementation.htm>, 15/11/2006.

Japan, the Republic of South Africa, Trinidad and Tobago, New Zealand, Canada, Australia, the United States, India, Lichtenstein, Bosnia and Herzegovina, Estonia, Jamaica, Israel, Germany (federal state of Brandenburg), and Slovenia.¹⁷

We turn to several examples for a fuller understanding of the test in the law, and to more easily evaluate the need for possible amendments to the Serbian FOIA.

3.1. Europe

a) The Council of Europe recommends the public interest test in Recommendation (2002)2 in the following form:

In Section IV, CoE first recommends possible exceptions, such as national security, defense, international relations, public safety, prosecution of criminal activities, and business interests of the private sector.¹⁸ The second paragraph states that access for all exceptions may be refused only when the harm test proves that the harm could be inflicted to a particular protected interest, but it leaves the possibility of disclosure, if there is overriding public interest.¹⁹

b) Regulation 1049/2001 determines the public interest test in the following way:

Article 4 establishes exceptions, dividing them into absolute and relative. An absolute exception is one where disclosure would undermine the protection of:

17 In the European Union, the following states still do not have laws on access to public information: Cyprus, Malta and Luxemburg. Banisar David, *Freedom of Information and Access to Government Records Law Around the World*, Freedominfo.org, 2006, <http://www.freedominfo.org/countries/index.htm>.

18 IV. Possible limitations to access to official documents:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i. national security, defense and international relations;
- ii. public safety;
- iii. the prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

19 2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in Paragraph 1, unless there is an overriding public interest in disclosure.

- The public interest with regard to public security, defense and military matters, international relations, financial, monetary or economic policy of the Community or a member state;
- Privacy and the integrity of the individual, particularly in accordance with the Community legislation regarding the protection of personal data.

The second paragraph defines the relative exceptions, with the formulation that institutions shall refuse access to a document where disclosure would undermine the protection of the listed rights, unless there is an overriding public interest in disclosure.²⁰

3.2. Bosnia and Herzegovina

Article 5 of the Freedom of Access to Information Act for the Federation of Bosnia and Herzegovina establishes exceptions:

Requested information shall be determined to be exempt from disclosure on a case-by-case basis only if the competent authority: a) claims an exemption under Articles 6, 7 and 8 of this Act for all or part of the information; and b) determines, upon applying the public interest test provided for in Article 9 of this Act, that the disclosure of the information is not justified in the public interest.

Articles 6, 7 and 8 of the Bosnian law define exceptions. In Article 9, the law describes in more detail the public interest test, calling it examination of the public interest, and providing several examples for the public authority bodies and applicants where the public interest would certainly override the exception.

In the Bosnian example, the difference between the “real” public interest test and a virtual one, based on the right of the public to know (from the Serbian FOIA), is clearly illustrated. The Bosnian law orders the public authority bodies to *consider* revealing documents or public information, first from the aspect of the listed elements, in favor of revealing information by the test, despite the existence of some exceptions.

Contrary to this example, the Serbian FOIA establishes that the mere *existence* (not restriction) of information of public importance, regardless of existence of exceptions, may be conditioned by the right of the public to know (except in cases listed by law). If there is no such condition, information may still exist, but it will not be designated public information to which the Serbian Law on Access to Information of Public Importance applies.

- 1) A competent authority shall disclose the requested information, notwithstanding that it has claimed an exemption under Articles 6, 7, or

20 The Regulation is available in English, at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R1049:EN:HTML\(15/11/2006\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R1049:EN:HTML(15/11/2006)).

8, where to do so is justified in the public interest. In so doing, it shall have regard to both any benefit and harm that may occur from the disclosure.

- 2) In determining whether disclosure is justified in the public interest, a competent authority shall have regard to considerations such as but not limited to, any failure to comply with a legal obligation, the existence of any offense, injustice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual, the public or the environment.

For comments by the Commissioner for Information of Public Importance of the Republic of Serbia, please see first comment on page 99.

3.3. Slovenia

The Slovenian Access to Public Information Act has eleven exceptions defined in Article 6, while Paragraph 2 of this Article prescribes:

“Without prejudice to the provisions in the preceding Paragraph, the access to the requested information is sustained, if public interest for disclosure prevails over public interest or interest of other persons not to disclose the requested information, except in the next cases...”

These cases are then enumerated. There are five absolute exceptions in the Slovenian law.²¹

4. Conclusion

The public interest test is recommended for all states, but foremost in states with a short tradition of democracy, in which the public sector is still more oriented towards concealment of information than to transparency. The Serbian FOIA should be amended in this regard. The public interest test is the highest standard of assessing access to public information that any state may achieve. This test is the heart of the law on access to information of public importance. Due to its broad definition (in some instances, it practically does not exist), the public interest test has been rejected by many states, because its existence might create a huge maneuvering space for the disclosure of documents deemed classified.

²¹ <http://www.ip-rs.si/index.php?id=27#c193>, Uradni list RS, No. 96/05. The public interest test has existed in Slovenia since June 2005 without abuse. The Commissioner has thus far used the test only four times in the decision-making process.

The Analysis of the Survey

Surveyed Bodies:

1. Commercial Court, Niš
2. District Court, Niš
3. Ministry of Health, Belgrade
4. District Public Prosecutor's Office, Niš
5. District Court, Novi Sad
6. High Commercial Court, Belgrade
7. Commercial Court, Belgrade
8. District Public Prosecutor's Office, Novi Sad
9. Commercial Court, Novi Sad
10. Ministry of Internal Affairs, Belgrade
11. Ministry of Finance, Belgrade
12. Commercial Court, Kragujevac
13. District Court, Kragujevac
14. District Public Prosecutor's Office, Kragujevac
15. Ministry of Science and Environment, Belgrade
16. Republic Public Prosecutor, Belgrade
17. National Assembly, Belgrade
18. Constitutional Court, Belgrade
19. Ministry of Justice, Belgrade
20. Republic Broadcasting Agency, Belgrade
21. Fifth Municipal Court, Belgrade
22. Fifth Municipal Public Prosecutor's Office, Belgrade
23. Belgrade Police Internal Affairs Sector
24. District Court, Belgrade
25. District Public Prosecutor's Office, Belgrade
26. Supreme Court of Serbia, Belgrade

1. Sample Questionnaire

QUESTIONNAIRE ON THE APPLICATION OF THE LAW ON ACCESS TO INFORMATION OF PUBLIC IMPORTANCE OF THE REPUBLIC OF SERBIA

To the authorized persons for requests for access to information of public importance in the public authorities

Position that the interviewee holds in the public authority:

Name and surname:

1. FOIA Knowledge

i. What is information of public importance?

KNOW DO NOT KNOW

ii. What are the deadlines for response according to the FOIA?

KNOW DO NOT KNOW

iii. When can the public authority extend the deadline for decision?

KNOW DO NOT KNOW

iv. In which cases can the request be refused (list at least 5 exceptions)?

KNOW DO NOT KNOW

v. What would you do if you did not hold the requested information and you were aware which body did hold that information?

KNOW DO NOT KNOW

vi. What are the contents of your Directory (catalogues of information)?

KNOW DO NOT KNOW

2. How many requests have you received since the adoption of the Law?

i. Less than 5

ii. 5–10

iii. 10–20

iv. 20–30

v. 30–50

- vi. 50–75
 - vii. 75–100
 - viii. 100–150
 - ix. 150–200
 - x. other (how many?) _____
3. How many requests have you received from journalists?
- A. 10% or less
 - B. 10–20%
 - C. 20–30%
 - D. 30–40%
 - E. more than 40%
4. To how many requests did you reply within 15 to 40 days since the day of receipt of the request?
- A. In how many cases did you extend the deadline (1–10)?
5. To how many requests have you not replied (silence of administration)?
- i. How did the applicant react to the silence?
 - ii. Do you intend to respond to those requests? When?
6. How many requests have you refused?
- A. On what grounds (give percentage or number of refusals)?
 - 1. document does not exist
 - 2. risk to life, health
 - 3. obstruct or impede criminal proceedings or detection of criminal offense
 - 4. seriously imperil national defense, national and public safety, or international relations
 - 5. substantially undermine the government's ability to manage the national economic processes

6. secrecy of documents
 7. conditions from Article 13 of the Law (too much information). How many pages did the information of public importance have?
 8. conditions from Article 14 of the Law (privacy and other personal rights)
7. Have you ever refused a request for access to information on the grounds that the public did not have a justified interest to know the information?
- If YES, how did you determine that there was no justified interest?
8. How well do you know the “three prong test” (balance test – judgment)?
- A. Very well
 - B. Well
 - C. I have some knowledge
 - D. I have very little knowledge
 - E. Not at all
9. When making a decision do you refer to laws relating to privacy?
10. To your knowledge, is there a law on the protection of personal data?
- YES NO
11. How do you act if there is no specialized law that would explicitly prohibit publication of personal data?
12. In which cases relating to the protection of privacy and other rights would you decide that the public interest overrides the private interest – interest of privacy?
- A. Spending of public funds
 - B. Public debate
 - C. Suspicion of corruption
 - D. Environmental pollution
 - E. Public health

- F. For topics which include large numbers of persons or legal persons
- G. For cases of transparency of the public officials

13. Have you encountered this type of balancing test?

YES NO

14. Do you think that some additional exceptions (reasons) are missing, so that more requests could be refused? If so, briefly list the exceptions and why?

15. How many complaints were lodged against your decisions?

- A. Do you think that the complaints were justified?
- B. What was the most frequent reason for the complaint?
- C. Did the applicants lodge the complaints in time?
- D. How many complaints were allowed/refused by the Commissioner?

16. Do you have published directories of information of public importance (data about the work) in your public authority?

YES NO

A. In which form?

- i. Internet page
- ii. Other _____

17. How often is your directory updated?

- i. daily
- ii. weekly
- iii. monthly
- iv. annually
- v. not updated

18. Have you submitted the annual report to the Commissioner?

YES NO

19. Do you charge costs for sending the information?

YES NO

A. According to which regulation?

B. How many times did you charge expenses for information of public importance (1 to 10)?

C. How much do you charge for one A4 copy?

D. What was the average amount charged? _____

E. What was the highest amount charged? _____

20. Have you organized the training of staff in your public authority body for the implementation of FOIA?

YES NO

A. In which form?

i. Seminars

ii. Other

21. What obstacles have you encountered while implementing the Law?

A. Financial

B. Administrative

C. Technical

D. Other_____.

22. What is the average time for providing the information to the applicant?

A. Up to 5 days

B. 5 – 10 days

C. 10 – 15 days

D. 15 – 30 days

E. 30 – 40 days

F. More than 40 days

-
23. How would you assess the position (power) of the Commissioner?
- A. Too strong
 - B. Strong
 - C. Moderate
 - D. Could be stronger
 - E. Too weak
24. Do you have a specific person designated to receive requests for information other than the head of the public authority body?
- YES NO
25. How would you evaluate the fines prescribed for violation of the Law?
- A. Too high
 - B. Appropriate
 - C. Too low
26. Have you ever been fined?
- YES NO
27. As the authorized person for requests for information of public importance, would you reveal the following information:
- A. Public servant's salary
 - B. Public servant's property
 - C. Judgment not yet final
 - D. Final court judgment
 - E. Public indictment
 - F. Lawsuit against state body
 - G. Privatization of a state company
 - H. Public procurement contract
 - I. Agricultural subsidies

- J. Social welfare
- K. Environment related information
- L. Evaluation of a judge

Additional question for the Government and the Commissioner:

28. How many times were you obligated to enforce a decision of the Commissioner?

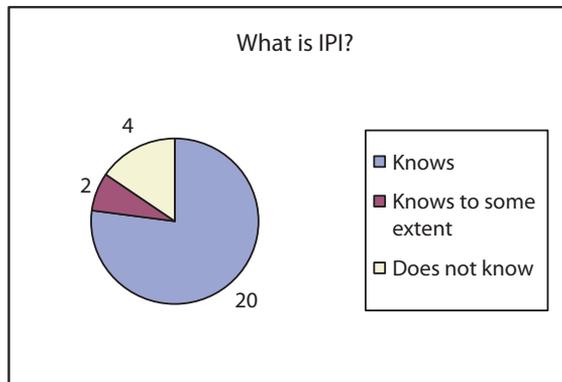
How many times did you in fact enforce that decision?

2. Results

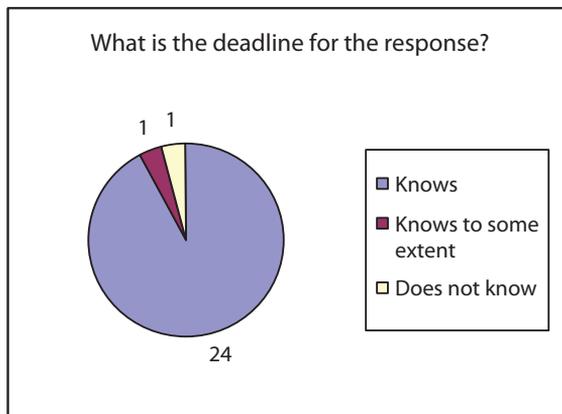
1. Knowledge of the legislative provisions

The knowledge of legislative provisions was assessed based upon an unannounced brief test. The responsible persons were asked six questions. The questions included basic provisions of the Serbian FOIA that every person responsible for access to information of public importance in a public authority should be familiar with. The questions were as follows (questions are the same as in the enclosed questionnaire):

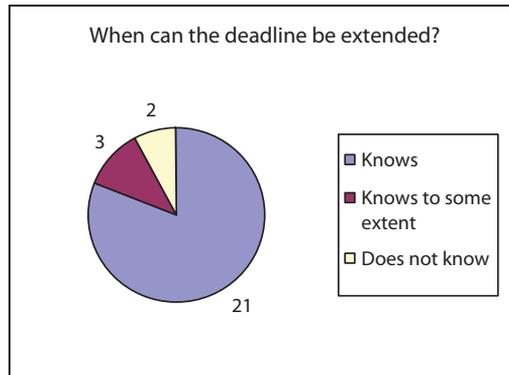
1.i. What is Information of Public Importance (IPI)?



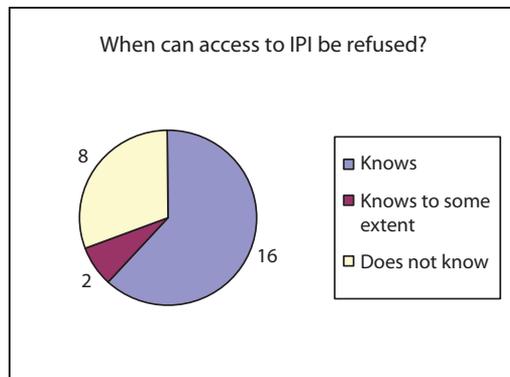
1.ii. What is the deadline for the response?



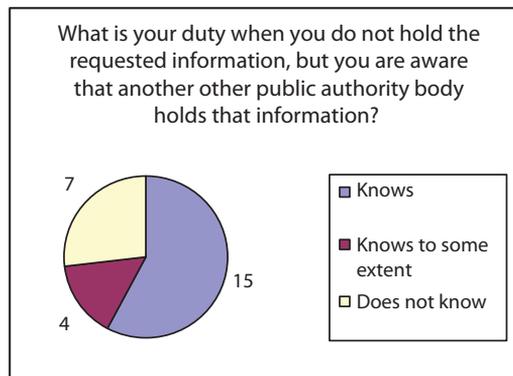
1.iii. When can the deadline for the decision be extended?



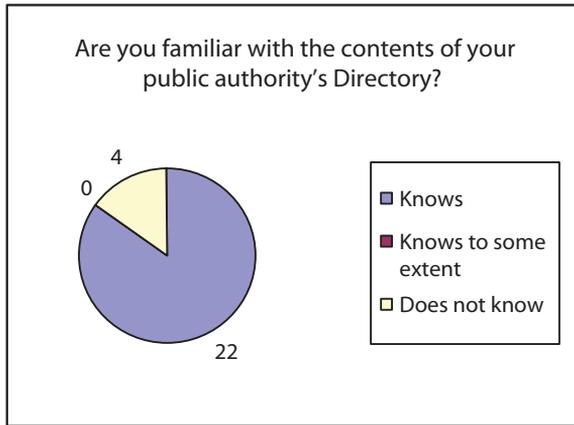
1.iv. When can access to IPI be refused?



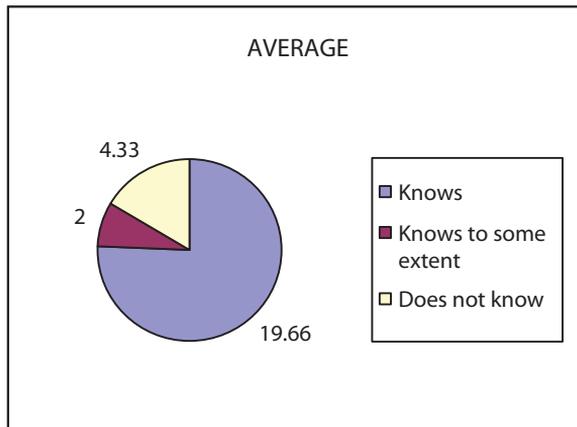
1.v. What is your duty when you do not hold the requested information, but you are aware that another other public authority body holds that information?



1.vi. Are you familiar with the contents of your public authority's Directory?

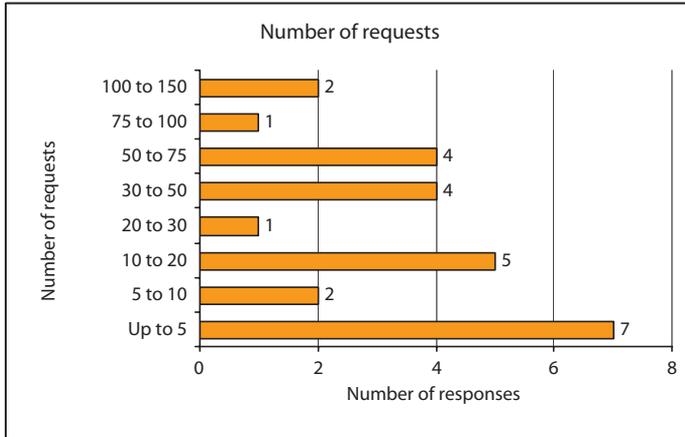


This section of the Survey shows that authorized persons of public authority bodies have good knowledge of the Serbian FOIA. Somewhat poorer results were shown with regard to knowledge of enumerated exceptions and situations when the public authority does not hold the requested information but is aware that another public authority body holds that information. Nevertheless, statistically the knowledge of authorized persons was good, between 75–80%.



2. Number of requests

The Survey showed that public authorities received a very small number of requests from applicants:

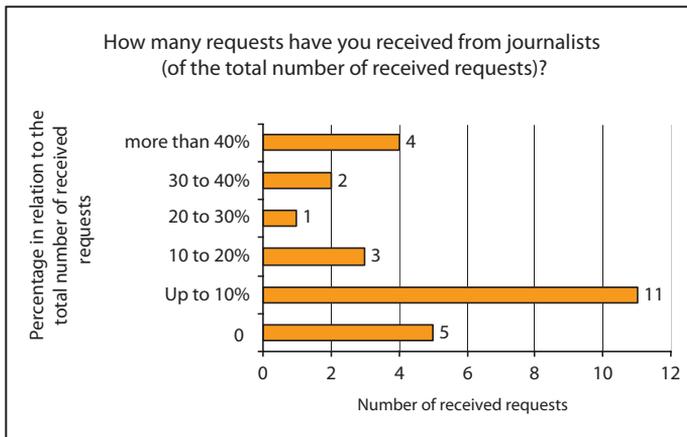


Possible reasons why the potential applicants rarely use FOIA include the following:

- Low level of awareness of the possibilities provided by the Serbian FOIA
- Low awareness of the existence of the Serbian FOIA
- Distrust in the FOIA procedure
- Poor enforcement record
- Other

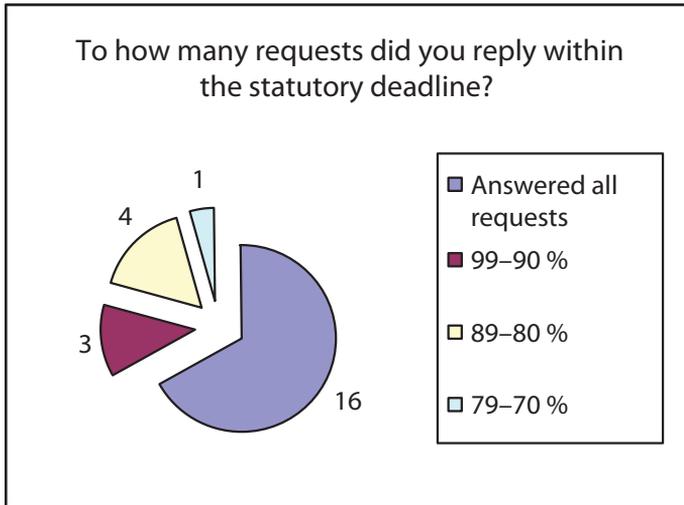
Authors of the Survey believe that the main reason for the small number of submitted requests can most probably be found in the low level of awareness of the Serbian FOIA and in the possibilities that FOIA provides for the applicants.

3. Journalists also rarely submit requests.

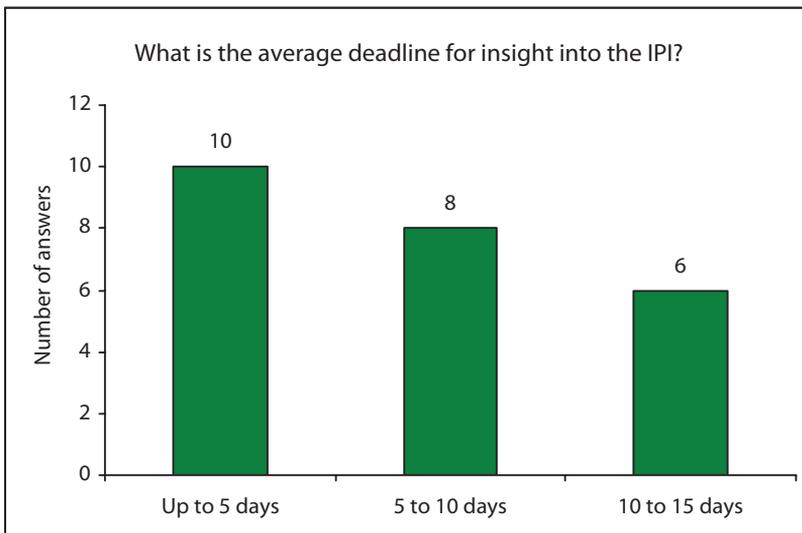


4. Adherence to deadlines

During the Survey it became apparent that public authorities in most cases respect the deadlines for deciding upon the request. Approximately two-thirds of the public authorities have made decisions upon *all* received requests within the deadlines, which is an undoubtedly encouraging result.



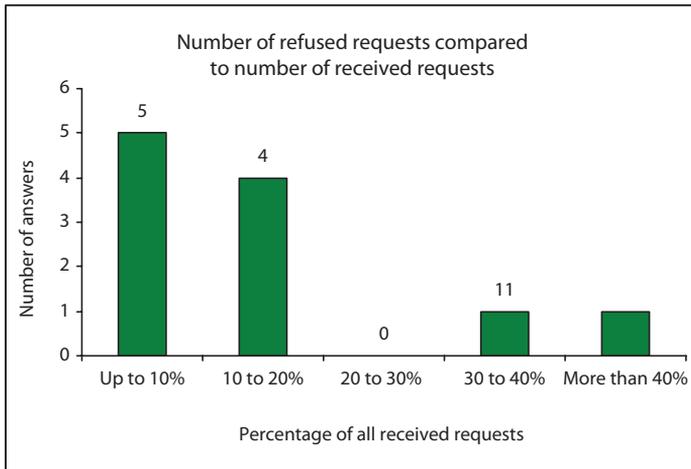
It is interesting to compare the former chart with the data gathered by asking the interviewees the number of times that a public authority body was “silent” upon a request (question no. 5). Only two bodies gave an affirmative answer to that question. Such result is not compatible with the above chart, which might indicate incorrectness of the submitted data.



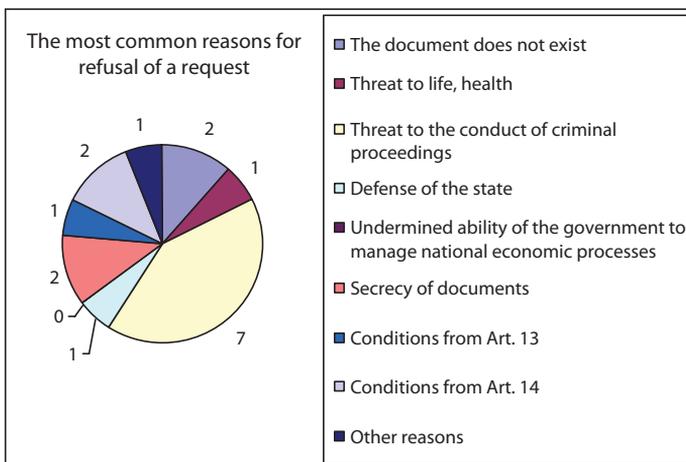
The Survey showed that state bodies in principle do not extend the deadlines, but they try to provide responses as soon as possible (question 22, previous chart). However, for 10% of requests, approximately one-third of the bodies have extended the deadline, while one public authority body has done so in approximately 20% of the cases.

6. Deciding upon a request

During the Survey it was obvious that state bodies refuse a small number of requests. Only 5 bodies refused up to 10% of received requests, 4 bodies refused between 11–20%, while two bodies refused up to 50% of received requests.

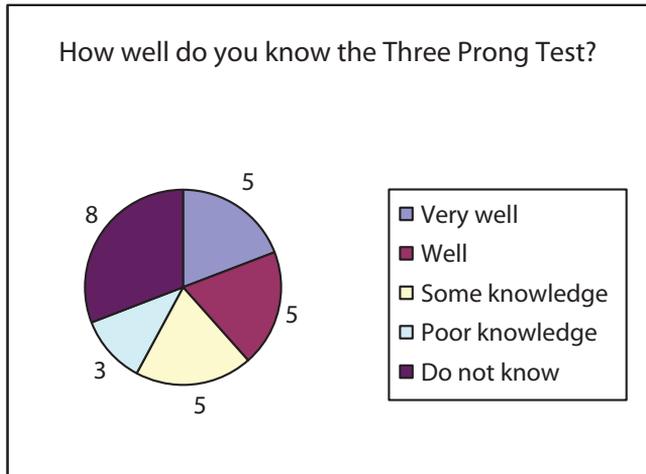


7. The most common reasons for refusal of a request are:

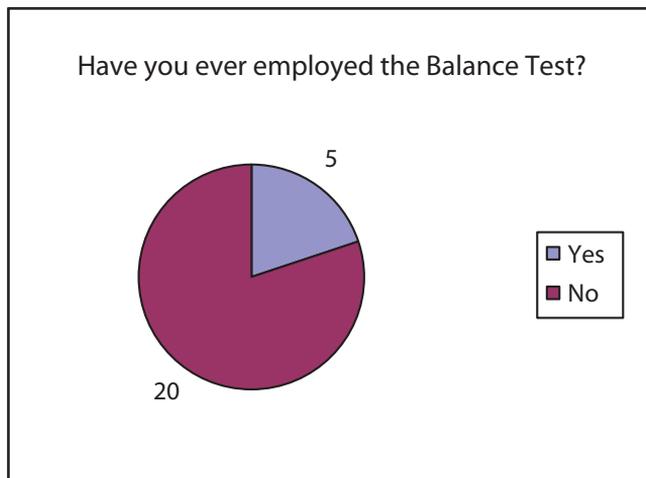


8. There was only one positive answer to the question “Have you ever refused a request for access to information because it was not information that the public had a justified interest to know”. In that particular case, the applicant requested to know when a particular judge was on vacation. The response was that the information is personal.

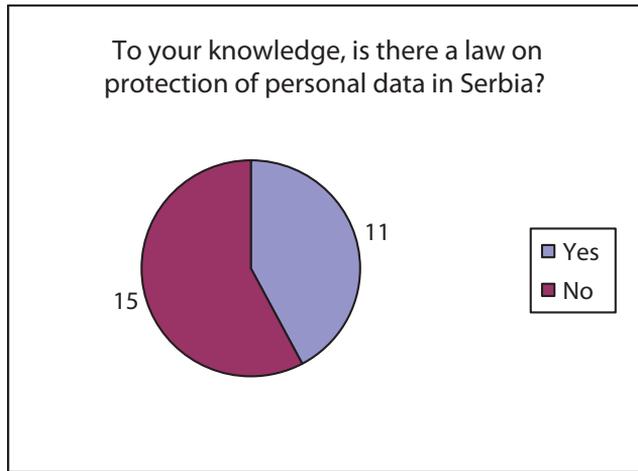
9. The Survey showed poor knowledge of the Three Prong Test:



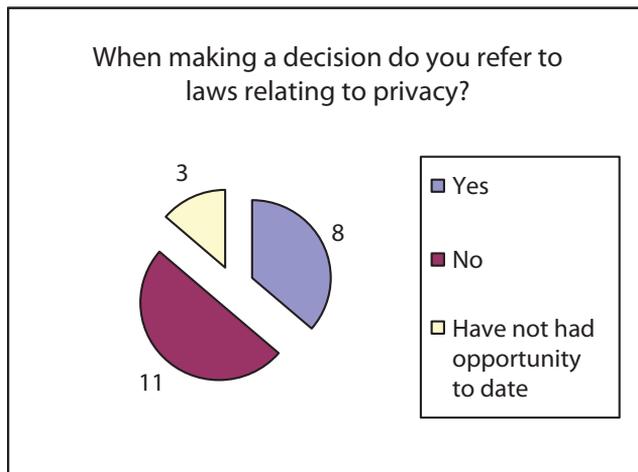
10. Most of the interviewees had not employed the balancing test, and one of the participants only used it within a specialized law.



11. Awareness of the existence of the law regulating protection of personal data showed weak results.



12. Low level of awareness of the existence of legislation on the protection of privacy was probably the reason for seldom reference to such laws by the public authorities.

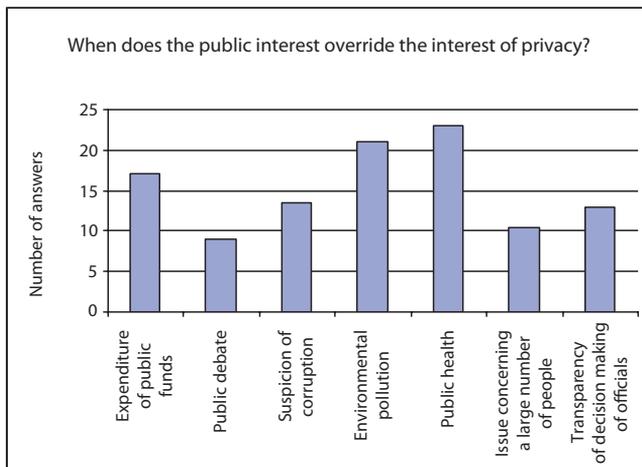


Out of those who provided positive replies, most referred to the Criminal Procedure Code, Law on Protection of Personal Data, and the Law on Police.

13. There were different answers to the question “How do you act if there is no specialized law that would explicitly prohibit publication of personal data”:

Answers	No. of answers
Do not know	3
There was no such case	5
Use Constitution, international law, general principles	1,5
Personal consent	1
Consultation with the Commissioner	1
Balancing “case by case”	4
<i>Lex specialis</i>	2
Obtain opinion from the Ministry of Culture	1
In accordance with FOIA	1,5
No answer	6

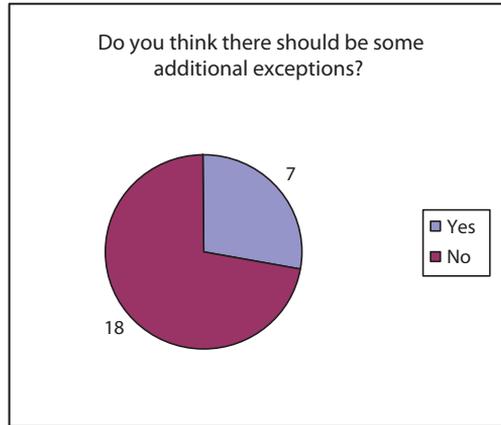
14. In several specific examples the responsible persons gave the following answers:



From this question it follows that responsible persons have a very high level of awareness of the right of the public to examine the work of public authorities. That awareness is somewhat lower in the area of public debate, in cases when certain information refers to more persons, and in cases of transparency of one’s function. It should be noted that in the case of a public debate, three more responsible persons added that they would decide on a “case by case” basis in the case of corruption and in the case where the information requested involved more persons, while two responsible persons answered that they would take into consideration the proceedings in that specific case.

15. There were 5 positive answers to the question of whether responsible persons had employed the balancing test.

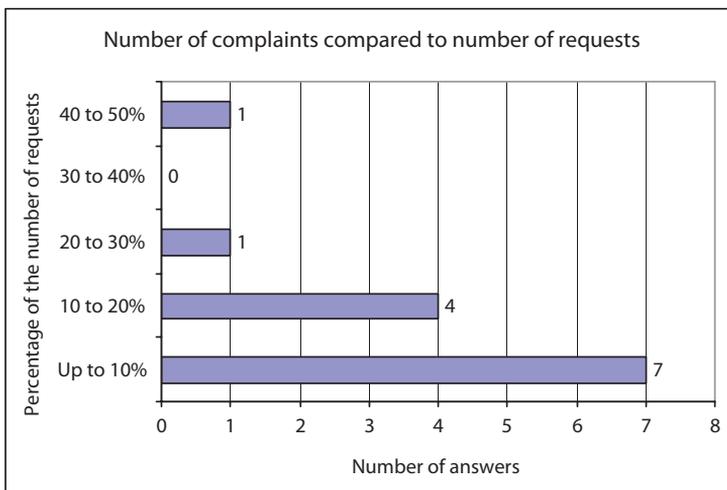
16. A majority of public authorities did not think there should be additional exceptions.



Out of those who replied YES to the last question, exceptions that were named include the following:

- Document being drafted
- Personal data
- Law on Secret Data
- Exclusion of court proceedings
- Absolute exceptions
- Secret data
- Exclusion of criminal procedure
- In case of violation of constitutional rights

17. Complaints



The above data shows that applicants do not often lodge complaints against public authority decisions. It should be noted that the data includes only those bodies who stated that there were complaints against their decisions, and comprises one-half of all interviewees. The other bodies (the other one-half of the interviewees) registered no complaints. It should be noted that in the “21 – 30%” subset, there was one complaint out of four requests.

In the interviewees’ opinion, most of the lodged complaints were unjustified.

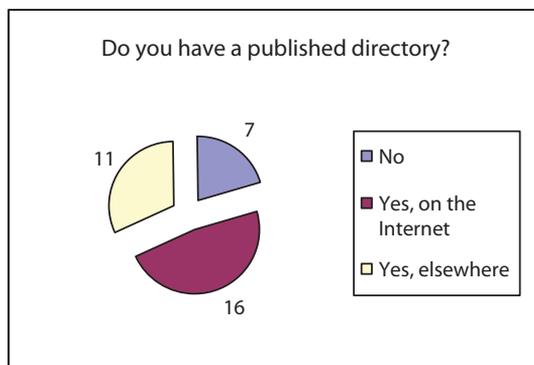


The Commissioner approved all complaints against three public authority bodies, while in other cases:

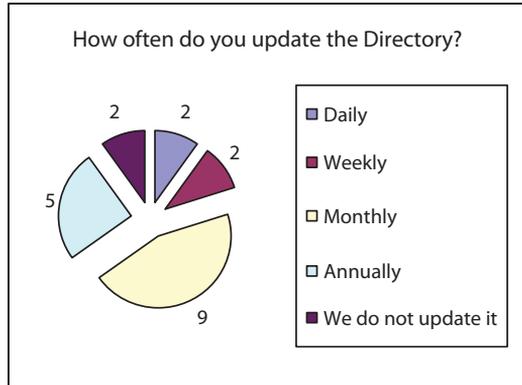
- He approved 10% of complaints filed against the decisions of two public authority bodies;
- He approved between 20% and 30% and between 40% and 50% (every other complaint) of complaints against the decisions of the one public authority body.

It should be noted that the numbers of complaints are small with respect to all bodies. However, it should be noted that one complaint lodged and approved is significant.

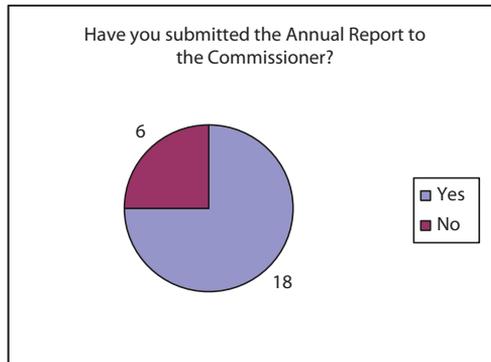
18. Directory of the public authority’s work



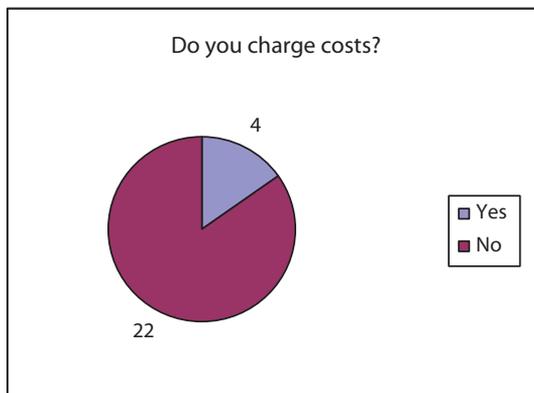
19. Updating of the Directory



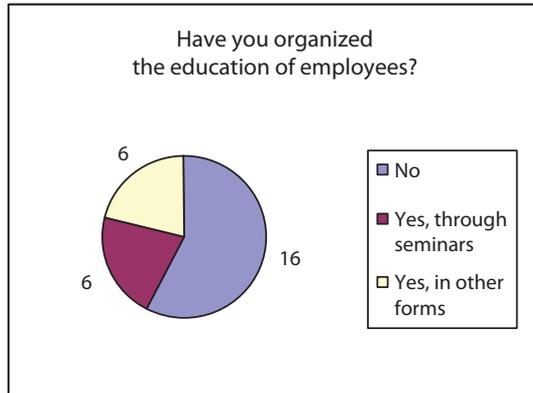
20. Annual Report



21. Costs of the proceedings

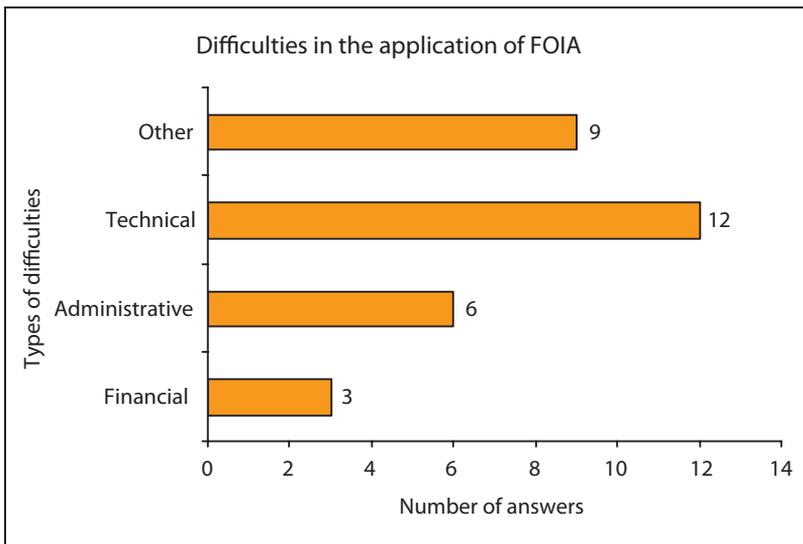


22. Education (Training)



Two of those who answered YES also indicated that they had organized training of employees on the level of the ministry (internal training) as well as in the form of meetings with the Commissioner.

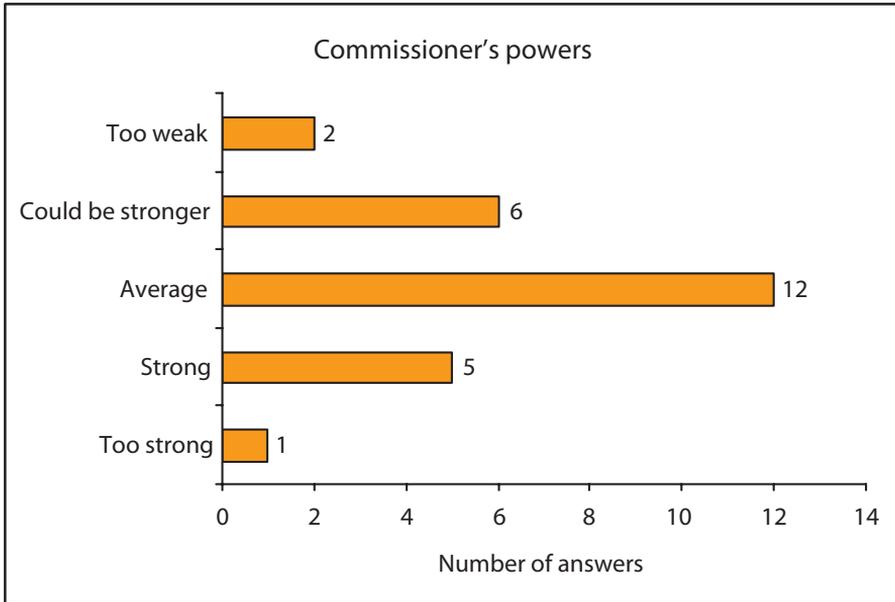
23. Difficulties in the application of FOIA



Among those who answered OTHER, the following reasons were given:

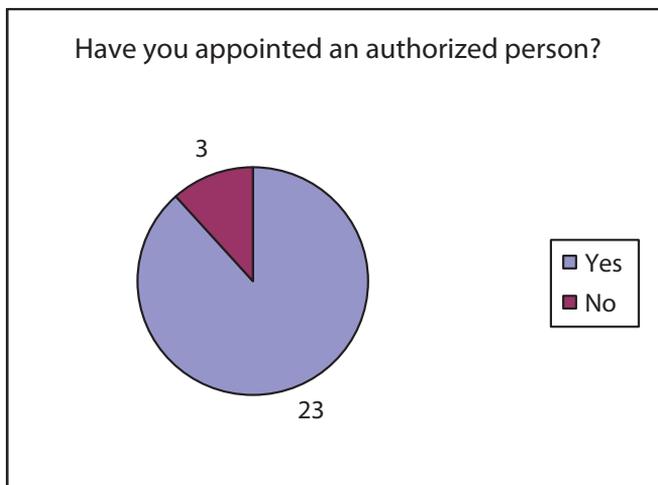
- Courts have low level of knowledge of FOIA
- New field

24. Commissioner for Information of Public Importance

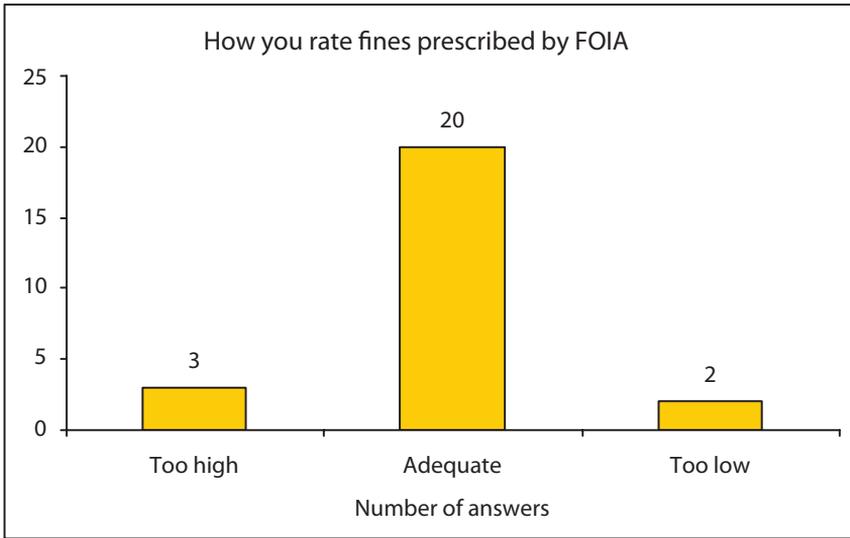


Most of the official persons believed that the Commissioner's powers were average. One interviewee stated that although his competencies, as listed in FOIA, are appropriate, they are "too weak in practice."

25. Authorized person for the requests for access to information of public importance.

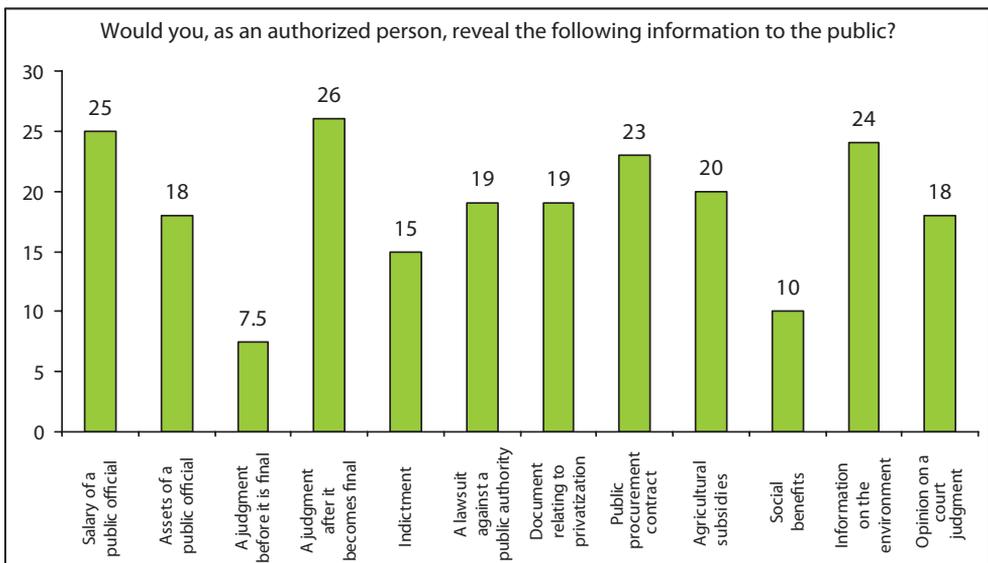


26. Evaluation of fines



Every surveyed participant answered NO to the question whether the authorized persons have already imposed a fine (question 26).

27. For the last question, the interviewers asked if the authorized persons would reveal the following information to the public (vertical line indicates number of answers):



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About the Authors

Team Leader

Nataša Pirc-Musar

Born in 1968 in Ljubljana, Slovenia. She graduated in 1992 from the Ljubljana Faculty of Laws and passed the bar examination in 1997. Following graduation, she joined Slovenian National TV where she worked for 6 years as a journalist and host of the main daily news television program “Dnevnik”. Following this, she worked for five years as the host of the show “24 hours” at the largest Slovenian commercial television network, POP TV.

Mrs. Pirc-Musar further refined her journalistic skills at CNN in Atlanta, Georgia and later spent two months studying at the media department of Salford University in Manchester, United Kingdom. During her studies, she worked at the BBC, Granada TV, SKY News, Reuter TV and Border TV. She also wrote newspaper articles and worked at several radio stations.

A desire for new challenges led Mrs. Pirc-Musar to the private sector. In 2001, she became head of corporate communication for Activa Group, the largest private financial company in Slovenia. In April 2003, she joined Vrhovno sodisce as the Director of Centra za iyobrazevanje in informiranje. In July 2004, upon proposal by the President of the Republic of Slovenia, Dr. Janez Drnovsek, Drzavni zbor appointed her Commissioner for Access to Information of Public Importance. Since December 31, 2005 (when the Inspectorate for Protection of Personal Data and the Public Information Commissioner were merged into one body), she has performed the duties of Information Commissioner.

Assistants

Sonja Bien

Born in 1977 in Maribor, Slovenia. Following the completion of the II Gymnasium in Maribor, she enrolled at the Ljubljana Faculty of Law. While studying, she worked for two years as a counselor for housing law with the Legal-Information Center of non-governmental organizations in Ljubljana (PIC). Ms. Bien assisted with the compilation of the civil procedure and property chapters of the book “Domaci Pravniki”. She graduated with distinction and her graduation paper, titled “Ureditev nevladinih organizacij v primerjalnopravnem pogledu”, was completed under the mentorship of Dr. Mitija Horvat. She then pursued post-graduate studies in Public and Administrative Law at the Ljubljana Faculty of Law.

Ms. Bien completed her traineeship in the High Court in Ljubljana. After the bar examination, she worked for one and a half years in the District Court in Ljubljana as judicial assistant in the office of the Court President.

On February 16, 2006, the Information Commissioner, Nataša Pirc-Musar, appointed her to the position of Deputy.

Janez Klemenc

Born in 1978 in Novo Mesto, Slovenia. After completing Gymnasium, he enrolled at the Ljubljana Faculty of Law and graduated in 2001. The title of his graduation paper was “Oblikovanje vlade – de lege ferenda”, under the mentorship of Professor Dr. Igor Kaucic. Following graduation, he continued his education at the Ljubljana Faculty of Law in the post-graduate area of criminal law.

From October 2001 until September 2003, he worked as a court trainee at the High Court in Ljubljana. Mr. Klemenc passed the bar examination on December 10, 2003. Immediately after, he joined the Okajne Sodisce in Novo Mesto as a judicial assistant and, since January 1, 2006 he has worked as an advisor in the Office of the Information Commissioner.

Klemen Misic

Born in 1977 in Ljubljana, Slovenia. After completing Gymnasium in Kocevje, he enrolled in the Ljubljana Faculty of Law. He graduated in 2003 under the mentorship of Professor Dr. Igor Kaucic with the paper “Uradno preciscelo besedilo zakona kot novi institut zakonodajnega procesa”.

During his studies, he worked at several Slovenian radio stations and at TV Slovenia. Mr. Misic worked for 5 years with TV Slovenia as a journalist and TV host. Next, he enrolled in post-graduate studies at the Ljubljana Faculty of Law in the constitutional law department.

Mr. Misic joined the Office of the Information Commissioner in September 2005. Since October 2006 he has worked as the State Supervisor for Protection of Personal Data.

Andreja Mrak

Born in 1976 in Ljubljana. Following graduation from the Sentvid Gymnasium in Ljubljana, Ms. Mrak enrolled at the Ljubljana Faculty of Law where she graduated cum laude in 2005. The title of her graduation work was “Folozofsko pravni vidiki ekocida”. Her mentor was Professor Dr. Senko Pilcanic.

During her studies, Ms. Mrak volunteered as the head of the Amnesty International office in Slovenia, where she cooperated on many projects, trainings and workshops. She is currently President of Amnesty International in Slovenia. Ms. Mrak has worked for the Information Commissioner since December 2005.

Law on Free Access to Information of Public Importance

(Official Gazette RS, No. 120/2004)

I Basic Provisions

Purposes of the Law

Article 1

This Law regulates the rights to access information of public importance held by public authority bodies, with the purpose of the fulfillment and protection of the public interest to know and attain a free democratic order and an open society.

In order to implement the right to access information of public importance, held by public authority bodies, a Commissioner for Information of Public Importance shall be established (hereinafter: Commissioner) by this Law, as an autonomous state body, independent in fulfilling its authority.

Information of Public Importance

Article 2

Information of public importance, within the meaning of this Law, is information held by a public authority body, created during work or related to the work of the public authority body, contained in a document, and related to everything that the public has a justified interest to know.

Information of public importance held by a public authority body shall denote the following notwithstanding: whether the source of information is a public authority or another person; the information medium (paper, tape, film, electronic media, et al) containing the document with the information; the date of creation of information; the manner of obtaining information; or another feature of information.

Public Authority Body

Article 3

In terms of this Law, a public authority body (hereinafter: public authority) shall denote notably: 1) A state body, territorial autonomy body, a local self-governance body, as well as an organization vested with public authority (hereinafter: state body); 2) A legal person founded by or funded wholly or predominantly by a state body.

Legal Presumptions of Justified Interest

Article 4

It shall be deemed that there is always a justified public interest to know information held by the public authority, in terms of Article 2 of this Law, regarding a threat

to, i.e. protection of public health and the environment, while with regard to other information the public authority holds, it shall be deemed that there is a justified interest of the public to know, in terms of Article 2 of this Law, unless proven otherwise by the public authority.

Content of the Right to Access Information of Public Importance

Article 5

Everyone shall have the right to be informed whether a public authority holds specific information of public importance, i.e. whether it is otherwise accessible.

Everyone shall have the right to access information of public importance by being allowed insight in a document containing information of public importance, the right to a copy of that document, and the right to receive a copy of the document upon request, by mail, fax, electronic mail, or in another way.

Principle of Equality

Article 6

Everyone shall be able to exercise the rights in this Law under equal conditions, notwithstanding their citizenship, temporary or permanent residence, i.e. seat, or personal attribute such as race, confession, nationality, ethnicity, gender, et al.

Ban of Discrimination of Journalists and Media Outlets

Article 7

A public authority may not give preference to any journalist or media outlet, when several have applied, by allowing only him/her or allowing him/her before other journalists or media outlets to exercise the right to access information of public importance.

Limitations of Rights

Article 8

The rights in this Law may be exceptionally subjected to limitations prescribed by this Law if that is necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or law.

No provision of this Law may be interpreted in a manner that could lead to the revocation of a right conferred by this Law or its limitation to a greater degree than the one prescribed in Para 1 of this Article.

II Exemption and Limitation of Free Access to Information of Public Importance

Life, Health, Security, Judiciary, National Defense, National and Public Safety, National Economic Welfare and Classified Information

Article 9

A public authority shall not allow the applicant to exercise the right to access information of public importance, if it would thereby:

- 1) Expose to risk the life, health, safety or another vital interest of a person;
- 2) Imperil, obstruct or impede the prevention or detection of criminal offence, indictment for criminal offence, pretrial proceedings, trial, execution of a sentence or enforcement of punishment, any other legal proceeding, or unbiased treatment and a fair trial;
- 3) Seriously imperil national defense, national and public safety, or international relations;
- 4) Substantially undermine the government's ability to manage the national economic processes or significantly impede the fulfillment of justified economic interests;
- 5) Make available information or a document qualified by regulations or an official document based on the law, to be kept as a state, official, business or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and outweigh the access to information interest.

Information of Public Importance Held by a Public Authority and Already Accessible to the Public

Article 10

A public authority need not allow the applicant the right to access information of public importance, if the information has already been published and made accessible in the country or on the Internet.

In the event set out in Para 1 of this Article, a public authority shall in its response notify the applicant on the information medium (number of the official medium, name of the publication, et al), where and when the sought information was published, unless these data are common knowledge.

Denial of Published Information by a Public Authority

Article 11

If a public authority disputes the accuracy or completeness of information of public importance that has been published, it shall make public the accurate and complete

information, i.e. shall enable insight into the document containing accurate and complete information, except in cases specified in Articles 9 and 14 of this Law.

Extraction of Information

Article 12

If the requested information of public importance can be extracted from other information contained in the document a public authority is not obliged to allow the applicant insight in, the public authority shall allow the applicant insight in the part of the document containing only the extracted information.

Abuse of Free Access to Information of Public Importance

Article 13

A public authority shall not allow the applicant to exercise the right to access information of public importance if the applicant is abusing the rights to access information of public importance, especially if the request is irrational, frequent, when the same or already obtained information is being requested again, or when too much information is requested.

Privacy and Other Personal Rights

Article 14

A public authority shall not fulfill the applicant's right to access information of public importance if it would thereby violate the right to privacy, the right to reputation or any other right of a person that is the subject of information, except if:

- 1) The person has agreed;
- 2) Such information regards a personality, phenomenon or event of public interest, especially a holder of a state or political post, and is relevant with regard to the duties that person is performing;
- 3) A person has given rise to a request for information about him/her by his/her behaviour, especially regarding his/her private life.

III Access Procedure before a Public Authority

Request for Information, Insight, Duplication and Referral

Article 15

An applicant shall submit a request in writing to a public authority to exercise the right to access information of public importance (hereinafter: request).

The request shall contain the name of the public authority, the full name and surname and address of the applicant and as many specifics as possible of the sought information.

The request may also contain other data that will facilitate the search for the requested information.

The applicant need not list the reasons for the request.

If the request does not contain data in Para 2 of this Article, i.e. if the request is deficient, the authorized person of the public authority shall be obliged to instruct the applicant free of charge how to rectify the deficiencies in the request, i.e. to give the applicant instructions on supplements.

In the event the applicant does not rectify the deficiencies within a specific deadline, i.e. within 15 days upon receipt of the instructions on supplements, and the deficiencies are such that they prevent the processing of the request, the public authority shall reach a decision to dismiss the request as deficient.

The public authority is obliged to allow an applicant access to information when the request is lodged orally, for the record, and such a request shall be specially recorded and deadlines apply accordingly, as if the request was submitted in written form.

A public authority may prescribe a sample request form, but it shall also be obliged to review requests that have not been lodged in that form.

Processing of Requests

Article 16

A public authority shall without delay and within 15 days from receipt of the request at the latest inform the applicant whether it holds the requested information, allow insight in the document containing the requested information i.e. issue or send out to the applicant a copy of the document. The copy of the document shall be deemed sent out on the day it leaves the office of the public authority from which the information was requested.

If the request regards information, which is presumed to be of relevance to the protection of a person's life or freedom, i.e. to the protection of public health and the environment, the public authority must inform the applicant it holds such information, allow insight in the document containing the requested information i.e. issue a copy of the document to the applicant within 48 hours upon receipt of the request.

If a public authority is for a justified reason unable to inform the applicant within the deadline in Para 1 of this Article that it holds the information, to allow him/her insight in the document containing the sought information, to issue i.e. send him/her a copy of the document, the public authority shall promptly inform the applicant thereof and set another deadline that may not exceed 40 days from receipt of the request, within which it shall inform the applicant that it holds the information,

allow him/her insight in the document containing the sought information, issue i.e. send the applicant a copy of the document.

If a public authority does not respond to the request within the deadline, the applicant may lodge a complaint with the Commissioner, except in cases prescribed by this Law.

Simultaneously with the notice on allowing the applicant insight in the document containing the requested information i.e. issuing the applicant a copy of the document, the public authority shall inform the applicant of the time, place and manner in which information shall be available for insight, the necessary costs of duplicating the document, or inform the applicant of the possibility to use his/her own equipment for duplication in the event it does not have the technical means for duplication.

The applicant shall be allowed insight in a document containing the requested information on the public authority's official premises.

The applicant may for justified reasons ask to gain insight in the document containing the requested information at a time different from the one set by the authority from which the information was sought.

A person, unable to have insight in a document containing the requested information without an escort, shall have the opportunity of insight with the assistance of an escort.

If the public authority grants the request it shall not issue a separate decision, but shall make an official note about it.

In the event a public authority refuses to inform the applicant, either entirely or partially, whether it holds the sought information, to allow the applicant insight in the document containing the requested information, to issue i.e. send to the applicant a copy of the document, it shall be obliged to issue a decision on the rejection of the request and give a written explanation of such a decision, and to notify the applicant in the decision of the legal means at his/her disposal to appeal such a decision.

Reimbursement

Article 17

Insight in a document containing the requested information shall be free of charge.

A copy of the document containing the requested information shall be issued and the applicant shall be obliged to reimburse the necessary costs of duplication, and also in the event of sending, the costs of sending.

The government shall sign the list of expenditures on the basis of which the public authority shall calculate the costs referred to in the previous Para.

Journalists, requesting a copy of a document for professional reasons, and non-governmental organizations, focusing on human rights and requesting a copy of a document for the performance of their registered activities, and all persons that request the information due to the imperilment, i.e. protection of public health and environment, shall be exempted from the obligation of reimbursement in Para 2 of this Article, except in cases referred to in Article 10, Para 1 of this Law.

The Commissioner shall follow the practice of reimbursement of costs and exemption from reimbursement and issue recommendations to the public authorities with the aim of standardizing the practice.

Insight and Duplication

Article 18

The equipment at the disposal of the public authority shall be used for insight in a document containing the requested information, unless the applicant asks to gain insight in the document by using his/her own equipment.

A public authority shall issue a copy of the document (photocopy, audio copy, video copy, digital copy, et al) containing the requested information in the form the information is in.

If a public authority does not have the technical means to make a copy of the document in terms of Para 2 of this Article, it shall make a copy of the document in another form.

If a public authority holds a document containing the requested information in the language in which the request was submitted, it shall be obliged to allow the applicant insight and make a copy of the document in the language in which the request was submitted.

Referral of Requests to the Commissioner

Article 19

When public authority does not hold the document containing the requested information, it shall refer the request to the Commissioner, and inform the Commissioner and the applicant who, to its knowledge, holds the document.

Processing of the Referred Request by the Commissioner

Article 20

Upon receipt of the request, the Commissioner shall check whether the document containing the information sought in the request is held by the public authority that had referred him the request.

In the event the Commissioner determines that the document in Para 1 of this Article is not held by the public authority that had referred the request of the applicant, the Commissioner shall refer the request to the public authority that holds the document, unless specified differently by the applicant, and inform the applicant thereof or refer the applicant to the public authority that holds the requested information.

The manner of acting described in Para 2 of this Article shall be determined by the Commissioner, depending on the efficiency of the realization of rights to access information of public importance.

In the event the Commissioner refers a request to the public authority from Para 2 of this Article, the deadline envisaged in Article 16 of this Law shall commence upon the day of receipt.

Other Procedural Provisions

Article 21

Provisions of the Law on General Administrative Procedure on decisions by a first instance body shall be applied to the procedure of a public authority, unless specified differently by this Law.

IV Procedure Related to the Commissioner

Right to a Complaint

Article 22

An applicant may lodge a complaint to the Commissioner within 15 days upon receipt of the public authority decision, if:

- 1) In contravention of Paras 1 and 3 of Article 16 of this Law, the public authority refused to inform the applicant whether it holds specific information of public importance or whether it is otherwise accessible to it, refused to allow insight in the document containing the requested information, to issue i.e. send to the applicant a copy of the document, or failed to do so within the prescribed deadline;
- 2) In contravention of Para 2 of Article 16 of this Law, the public authority failed to reply to a submitted request within the prescribed deadline;
- 3) In contravention of Para 2 of Article 17 of this Law, the public authority conditioned the issuance of the copy of the document containing the requested information by payment of a fee exceeding the necessary costs of duplication;
- 4) The public authority does not allow insight in the document containing the requested information in the manner set forth in Para 1 of Article 18 of this Law;

- 5) The public authority does not allow insight in the document containing the requested information, i.e. does not issue a copy of the document in the manner prescribed in Para 4 of Article 18 of this Law.

A complaint cannot be lodged against the decision of the National Assembly, the President of the Republic, Government of the Republic of Serbia, the Supreme Court of Serbia, the Constitutional Court and the republican Public Prosecutor.

An administrative dispute complaint may be lodged against the decision in Para 2 of this Article, in accordance with law, on which the court notifies Commissioner *ex officio*.

Consideration of Complaints by the Commissioner

Article 23

Provisions of the Law on General Administrative Procedure related to the appellate decisions of second instance body shall be applied to the procedure before the Commissioner, unless specified differently by this Law.

Article 24

The Commissioner shall reach a decision promptly and within 30 days from the submission of the complaint at the latest, upon giving the public authority and, if necessary the applicant, the opportunity to reply in writing.

The Commissioner shall dismiss a complaint that is inadmissible, overdue or filed by an unauthorized person. The public authority shall prove it has acted in accordance with its obligations set forth in this Law.

Commissioner Decisions on Measures to Promote Transparency of Work

Article 25

Upon receipt of a request or *ex officio*, the Commissioner shall reach the decision establishing that a public authority has not fulfilled its obligations set forth in this Law, with the exception of public authorities referred to in Para 2 of Article 22 of this Law, and order the measures the authority is to take to fulfill them, upon giving the opportunity to the authority to reply in writing.

The request referred to in Para 1 of this Article cannot be submitted in cases when this Law foresees the right to complaint.

Inquiry by the Commissioner

Article 26

The Commissioner shall undertake actions to determine the facts necessary for reaching the decision referred to in Articles 24 and 25 of this Law. In order to deter-

mine the facts referred to in Para 1 of this Law, the Commissioner shall be allowed insight in every information medium this Law applies to.

Legal Remedies against Commissioner's Decisions

Article 27

An administrative dispute complaint may be lodged against a Commissioner's decision.

Obligatory character of Commissioner Decisions and Conclusions

Article 28

The decisions and conclusions of the Commissioner shall be obligatory.

The enforcement of the decisions and conclusions of the Commissioner shall be procured by the Government of the Republic of Serbia if necessary.

V Appointment, Position and Authority of the Commissioner

Seat of the Commissioner

Article 29

The seat of the Commissioner shall be in Belgrade.

Appointment

Article 30

The National Assembly of the Republic of Serbia (hereinafter: National Assembly) shall appoint the Commissioner by a majority of votes of the MPs at the proposal of the Board of the National Assembly competent for information.

A person of renowned reputation and expertise in the field of protecting and promoting human rights shall be appointed Commissioner.

A person, who fulfills the requirements for employment in state bodies and has a Bachelor's degree in Law and at least ten years of working experience, may be appointed Commissioner.

A person holding a post in or employed by a state body or a political party may not be appointed Commissioner.

The Commissioner shall be appointed to a seven-year term of office.

The same person may be appointed Commissioner twice the most.

End of Term of Office

Article 31

The term of office of a Commissioner shall cease before the expiration of his/her term of office at his/her request, or upon turning sixty-five years of age, and upon dismissal.

The National Assembly shall decide on the end of Commissioner's term of office.

A Commissioner shall be dismissed if he/she has been convicted of a crime with a sentence of imprisonment, in the event of permanent working incapacity or if he/she holds a post in or is employed by a state body or political party, if he/she loses the citizenship of the Republic of Serbia, or if he/she performs his duties unprofessionally and unconscientiously.

The procedure for dismissing the Commissioner shall be launched on the initiative of one third of MPs. The Board of the National Assembly competent for information shall establish whether there are reasons for dismissal and shall inform the National Assembly thereof.

The Board of the National Assembly competent for information shall also inform the National Assembly about the request of the Commissioner to have his/her duties terminated, as well as about the fulfillment of requirements for the termination of term of office due to age.

If the National Assembly does not decide about the request within 60 days, it shall be deemed that with the expiration of that deadline the Commissioner's duties terminate. In other events, the Commissioner's duties cease on the day the National Assembly states so in its decision.

Status of the Commissioner

Article 32

The Commissioner shall be autonomous and independent in the exercise of his/her powers. In the exercise of his/her powers the Commissioner shall neither seek nor accept orders or instructions from state bodies or other persons.

The Commissioner shall have the same salary as a judge of the Supreme Court, other labor rights, in accordance with law, and the right to reimbursement of costs incurred during the discharge of his/her duties.

The Commissioner may not be held liable for an opinion he/she expressed or a recommendation he/she made while performing his/her duties; in the event of a legal proceeding initiated over an act of crime committed in the exercise of his/her functions, he/she may not be detained without the consent of the National Assembly.

Deputy Commissioner

Article 33

The Commissioner shall have a Deputy, who shall be appointed by the National Assembly, upon the recommendation of the Commissioner. The Commissioner shall nominate for the post of Deputy Commissioner a person fulfilling the requirements for employment by state bodies.

The Deputy Commissioner shall be appointed to a seven-year term of office.

The same person may be appointed Deputy Commissioner twice the most.

The Deputy Commissioner shall perform the duties of the Commissioner in the event of the absence, death, tenure expiration, dismissal, or the temporary or permanent incapacity of the Commissioner to exercise his/her powers.

Provisions of this Law on the cessation of duties of the Commissioner shall accordingly apply to the cessation of duties of the Deputy Commissioner.

Procedure for dismissing the Deputy Commissioner shall start upon initiative of the Commissioner.

Staff of the Commissioner

Article 34

The Commissioner shall have staff that will help him/her exercise his/her powers.

The Commissioner shall pass a book of regulations on the work of his/her staff, with approval from the National Assembly. The Commissioner shall independently decide on the employment of expert staff and other employees, in accordance with law, guided by the need to professionally and efficiently exercise his/her powers.

The regulations on working conditions in state bodies shall accordingly apply to staff working for the Commissioner.

The funds required for the work of the Commissioner and his/her staff shall be secured in the budget of the Republic of Serbia.

Powers of the Commissioner

Article 35

The Commissioner shall:

- 1) Monitor the respect of obligations by the public authorities regulated by this Law and report to the public and National Assembly thereof;

- 2) Initiate the preparation or change of regulations for the implementation and promotion of the right to access information of public importance; 3) Propose to public authorities measures to be taken to improve their work regulated by this Law;
- 4) Undertake necessary measures to train employees of state bodies and to inform the employees of their obligations regarding the rights to access information of public importance with the aim of their effective implementation of this Law;
- 5) Consider complaints against the decisions of public authorities that violate the rights regulated by this Law;
- 6) Inform the public of the content of this Law and the rights regulated by this Law;
- 7) Perform other duties stipulated by this Law.

Reports

Article 36

The Commissioner shall lay with the National Assembly an annual report on the activities undertaken by the public authorities in the implementation of this Law and his/her own activities and expenses within three months from the end of the fiscal year.

In addition to the report in Para 1 of this Article, the Commissioner shall lay with the National Assembly other reports as he sees fit.

VI Measures for Improving the Transparency of Work of Public Authorities

Manual for Exercising Rights

Article 37

The Commissioner shall without delay publish and update a manual with practical instructions on the effective exercise of rights regulated by this Law in the Serbian language, and in languages that are defined as official languages by law.

The manual in Para 1 of this Article shall obligatorily contain the content and scope of rights to access information of public importance, as well as how these rights can be exercised.

The Commissioner shall be obliged to inform the public of the content of the manual in Para 1 of this Article via the press, electronic media, the Internet, public panel discussions and in other ways.

Authorized Person of the Public Authority

Article 38

A public authority shall appoint one or more official persons (hereinafter: authorized person) to respond to request for free access to information of public importance.

The authorized person shall:

- 1) Receive requests, inform the applicant of holding information and give insight in the document containing the requested information, i.e. deliver the information in an appropriate manner, reject the request with a decision, provide the necessary assistance to the applicants to exercise their rights regulated by this Law;
- 2) Take measures to promote the practice of administering, maintaining, storing and safeguarding information mediums.

If an authorized person referred to in Para 1 of this Article has not been appointed, the duties of the authorized person shall be performed by the head of the public authority.

Obligation to Publish a Directory

Article 39

A state body shall at least once a year publish a directory with the main data about its work, notably:

- 1) Description of its powers, duties and in-house organization;
- 2) Data on the budget and means of labor;
- 3) Data with regard to the types of service it directly provides to interested parties;
- 4) Procedure for submitting a request to this state body, i.e. for lodging a complaint against its decisions, actions or negligence;
- 5) Overview of the requests, complaints and other direct measures undertaken by the interested parties, of the decisions by this state body on the submitted requests and lodged complaints, i.e. responses to other direct measures undertaken by interested parties;
- 6) Data on the manner and place of storing information mediums, type of information it holds, type of information it allows insight in and the description of the procedure for submitting a request;
- 7) Names of the heads of this state body, descriptions of their powers and duties and procedures by which they reach decisions;
- 8) The rules and decisions of this state body regarding its transparent work (working hours, address, contact telephones, logo, accessibility for persons

with special needs, access to sessions, permissibility of audio and video recording, et al), as well as every authentic interpretation of these decisions;

- 9) Regulations and decisions on exemptions or limitations of the transparency of work of the state body and explanations thereupon;

The state body shall allow an interested party insight in the directory free of charge, or give him/her a copy of the directory provided the party reimburses the necessary costs.

Guidebook for Publishing the Directory

Article 40

The Commissioner shall publish a guidebook according to which the directory from Article 39 of this Law shall be published and proffer advice at the request of a state body to ensure the correct, complete and timely fulfillment of the obligation to publish a directory.

Maintaining Information Mediums

Article 41

The public authority shall maintain the information mediums so as to enable the exercise of the right to access information of public importance in keeping with this Law.

Training of Staff

Article 42

With the aim of effectively implementing this Law, a state body shall train its staff and instruct its employees on their obligations regarding the rights regulated by this Law.

The staff training in Para 1 of this Article shall notably include: the content, scope and importance of the right to access information of public importance, the procedure for exercising those rights, the procedure for administering, maintaining, and safeguarding information mediums, and types of data which the state body is obliged to publish.

Reporting to the Commissioner

Article 43

A state body authorized person shall submit an annual report to the Commissioner on the activities of the body undertaken with the aim of implementing this Law, which shall contain the following data:

- 1) Number of submitted requests, number of wholly or partly approved requests and the number of rejected or dismissed requests;

- 2) Number and content of the complaints against the decisions to reject or dismiss a request;
- 3) Total sum of fees charged for the exercise of the right to access information of public importance;
- 4) Measures taken with regard to the obligation to publish a directory;
- 5) Measures taken with regard to maintaining information mediums;
- 6) Measures taken with regard to staff training.

VII Compensation of Damages

Article 44

The public authority shall be held liable for damages caused by the inability of a media outlet to publish information because a public authority had without justification denied or limited its rights to access information of public importance from Article 5 of this Law, i.e. because a public authority gave preference to a journalist or media outlet in contravention of provisions of Article 7 of this Law.

VIII Supervision

Article 45

The implementation of this Law shall be supervised by the Ministry in charge of information affairs.

IX Punitive Provisions

Article 46

A fine between 5,000 and 50,000 dinars shall be imposed upon the authorized person in a public authority if the public authority:

1. Acts in contravention of the principle of equality (Article 6);
2. Discriminates against a journalist or a media outlet (Article 7);
3. Fails to specify the information medium, where and when the requested information was published (Para 2 of Article 10);
4. Fails to communicate accurate and complete information, i.e. fails to allow insight in a document containing accurate and complete information. (Article 11);
5. Fails to allow the applicant insight in a document or to make a copy of the document in the language in which the request was submitted (Para 4 of Article 18);

6. Refuses to receive a request, fails to inform the applicant of possessing the information, or fails to allow insight in a document containing the requested information, i.e. does not deliver a copy of the document in an appropriate way, fails to issue a decision on rejecting the request and refuses to provide the applicants with the necessary assistance for exercising their rights (Sub-Para 1 of Para 2 of Article 38).

Article 47

A fine between 5,000 and 50,000 dinars shall be imposed on the responsible person in a state body if that state body fails to publish a directory with the prescribed data on its work (Article 39).

Article 48

A fine between 5,000 and 50,000 dinars shall be imposed on the authorized person of a public authority in the event he/she fails to submit to the Commissioner an annual report with the prescribed data on the activities the authority undertook with the aim of implementing this Law (Article 43).

X Final Provisions

Article 49

Public authorities shall nominate the authorized persons for deciding on requests for free access of information of public importance within 30 days after this Law takes effect.

The National Assembly shall appoint the Commissioner within 45 days after this Law takes effect.

Article 50

This Law shall come into effect the eighth day upon publication in the "Official Gazette of the Republic of Serbia".

**Law on Amendments of the Law
on Free Access to Information of Public Importance**
(Official Gazette No. 54/2007)

Article 1

In the Law on Free Access to Information of Public Importance (The Official Gazette of the Republic of Serbia, number 120/04), in Article 30, item 1 after the words: “(hereinafter: The National Parliament)”, the following words are added: “by the majority votes of all members of parliament”.

Article 2

In Article 31, item 2, after the words: “the decision is made” a comma and the following words are added: “by the majority votes of all members of parliament”.

Article 3

In Article 33, item 1, after the words: “The National Parliament”, the following words are added: “by the majority votes of all members of parliament”.

Article 4

In Article 35, item 2 is added, which states: “The Commissioner may initiate the procedure for the evaluation of the constitutionality and legality of the law and other general documents.”

Article 5

Should the same person be elected as Commissioner or Deputy Commissioner before the end of his term, his term will end upon the end of seven years from the first election and he may be elected one more time.

Article 6

This law becomes effective on the day of its publication in the “Official Gazette of the Republic of Serbia.”